MISSISSIPPI LAW JOURNAL

THE UNIFORM COMMERCIAL CODE AND MISSISSIPPI LAW OF PERSONAL PROPERTY SECURITY

John Hanna

AN APPRAISAL OF SUMMARY JUDGMENT PRACTICE UNDER RULE 56 FEDERAL RULES OF CIVIL PROCEDURE

L. Arnold Pyle

March 1960

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Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, under the Act of Congress of March 3, 1879.

Published in October, December, March, and May

$4.00 Per Annum $1.50 per Current Number

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

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Mississippi Law Journal

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VOLUME XXXI MARCH 1960 NUMBER 2

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Mississippi Law Journal

VOLUME XXXI MARCH 1960 NUMBER 2

THE UNIFORM COMMERCIAL CODE AND MISSISSIPPI LAW OF PERSONAL PROPERTY SECURITY

*John Hanna**

I. INTRODUCTION

This discussion will cover principally the effect of the Uniform Commercial Code on Mississippi law as the latter includes uniform acts relating to personal property security and in respect of certain other Mississippi laws on the same topic. Space and limited time for research do not permit consideration of all aspects of the subject. It may be that some future writer will be interested in publishing a continuation of this study. One omission, which might well be considered, is the actual Mississippi practice in secured financing, especially in relation to agriculture. In many jurisdictions, and this may be true in Mississippi, there are interesting variations in the utilization of security devices, some of which are ingenious adaptations in practice to avoid actual or possible adverse legal rules. Not all of these innovations may stand up as well against attack as their inventors hope. Not much research has been done to ascertain, aside from disclosures in reported litigation, how lenders, notably in agricultural finance, actually try to protect themselves against default. It has been suggested that even under state law, some of these practices are of doubtful validity, and even more questionable in bankruptcy.[1]

As a preliminary to a review of the effect of the Uniform Commercial Code, if adopted here, on Mississippi security law, which will involve a summary of the principal features of Article 9, the Secured Transactions article of the Code, a few observations on the background of the Code and its drafting, may be made. These are matters that most lawyers

*Visiting Professor of Law, University of Mississippi; Professor of Law Emeritus, Columbia University; formerly Reporter on Security for the American Law Institute; Consultant to the New York Law Revision Commission; member of the Secured Transactions subcommittee of the Editorial Board of the American Law Institute in connection with the revision of the Uniform Commercial Code.

[1]See Coates, Law and Practice in Chattel Secured Farm Credit (1954). Note especially the discussion of lease-security provision, p. 29, and of attempts to circumvent rules as to security on after-acquired property, p. 13, under Wisconsin law.

have read about or heard about, and might be expected to know, except that most lawyers are too busy with their own practice to keep up with even major proposals of law reform unless they have some personal responsibilities for the development or the adoption of these proposals.

The Uniform Commercial Code is the joint product of the National Conference of Commissioners on Uniform State Laws and of the American Law Institute. The completed code after approval by the Conference and the Institute was submitted to and approved by the House of Delegates of the American Bar Association. Lawyers like to form independent opinions on statutory innovations and yet also recognize the professional necessity and desirability of accepting the judgment of competent and respected authority. A persuasive argument can be made that no other American commercial legislative proposal has ever been made to the American Bar with such informed and disinterested support as the Uniform Commercial Code.[2]

The National Conference on Uniform State Laws has been called the "world's least known legislature,"[3] No actual legislature ever had its high average quality of membership. Since in any commercial area, it has always been open to Congress to adopt a Federal statute applying to interstate transactions, it seems safe to assert from the success of the Conference in persuading states voluntarily to adopt uniform laws, that no organization has done more to preserve state jurisdiction in such areas.

The National Conference was organized under the auspices of the American Bar Association. While its technical beginning may go back to 1889 or even earlier, its name and first uniform law, the Uniform Negotiable Instruments Act, date from 1896. Since 1892 the Conference has met every year except 1945 and since 1912 all states and territories have been represented. Most states are represented by three members, usually appointed by the governor, but there are also life and associate members, who do not have the right to vote unless they are also regular members. Voting on proposed acts is by states. The usual term of service is three

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[2]The bibliography on the Uniform Commercial Code already amounts to a fair-sized pamphlet. Among recent articles are Coogan, Article 9 and the "Floating Lien," 72 Harv. L. Rev. 838 (1959); Effect of Article 9 upon Chattel Mortgages in Kentucky, 47 Ky. L. J. 94 (1958); Selected Priority Problems, 68 Yale L. J. 751 (1959); Uniform Commercial Code and Illinois law, a symposium, 53 Nw. U. L. Rev. 315 (1958); Article 9—Secured Transactions, 22 Tenn. L. Rev. 848 (1953). The American Law Institute in 1954 published a bibliography on the Code. See also, New York Law Revision Commission Report, Leg. Doc. 65 A (1954) bibliography 19-46. The introduction to the 1957 official edition of the Code contains information about its drafting. See also Schnader, The Uniform Commercial Code Marches On, 13 Bus. Law. 639 (1958). On the Code in Pennsylvania, see Funk, How the Code Has Affected Bank Operations, 11 Bus. Law 57 (1955). There have been many studies of the effect of the Code on the laws of particular states. The most elaborate was in New York. Among shorter studies, that of the Connecticut Temporary Commission (1959) may be suitable as a model for similar inquiries.

[3]Blackwood, Uniformity in the Law—the National Conference of Commissioners on Uniform State Laws, 19 Mont. L. Rev. 149 (1958). See also Day, National Conference on Uniform State Laws, 8 U. Fla. L. Rev. 276 (1955); Connor, The Work of the National Conference, 23 Tul. L. Rev. 518 (1949).

years. The members receive no compensation, and not all receive expenses. The Conference has a permanent headquarters at the American Bar Center in Chicago. It is supported by contributions from the American Bar Association, from some of the states and from some state bar associations. It meets annually at the same place as the American Bar Association, usually for the preceeding week. Since 1896 the Conference has approved about 160 acts, including a few drafted by other organizations. About 100 acts are now adopted or recommended for adoption by the states. The Conference has a list of model acts.[4]

The National Conference has officers, standing committees, sections and special committees. Its policy is to draft a uniform act for which there is demand, a likelihood of enactment in a substantial number of states, a practical need for uniformity, and where the subject is neither politically controversial nor one involving disputed trade or professional standards. When a project is approved, it is assigned to a special committee, which either drafts the act or engages a draftsman who need not be a member of the Conference. If this draftsman receives an honorarium, it is a modest one. After the committee is satisfied with the act it is placed on the annual agenda, where it may be debated for several years before a final vote. Consultation with various interested and expert parties is the rule. No act is approved unless it is acceptable to a majority of states voting, and by the affirmative vote of at least twenty states. The procedure then is to submit the act to the House of Delegates of the American Bar Association for recommendation to the states. The uniform acts include commercial statutes, civil and criminal procedure acts and a variety of property and miscellaneous laws.[5]

The organization, administration and limited budget of the National Conference indicate both its actual and potential usefulness and its limitations. Its greater utility is in respect to acts of comparatively narrow scope, especially where there is already a consensus of informed opinion. Without underestimating its great contribution to American law through the major commercial acts it has sponsored, some of which have represented important contributions from other groups, the Conference is severely handicapped where drafting requires extensive and skilled research in both law and business practice, continuous drafting

[4]Details about the organization and work of the Conference may be found in its annual Handbook. The volumes of the Uniform Laws Annotated show the state adoptions of the various acts. The present Mississippi members of the National Conference are Robert J. Farley, University; Hugh N. Clayton, New Albany; Gibson B. Witherspoon, Meridian. L. Barrett Jones of Jackson was a member of the Commercial Acts Section when the Code was drafted.

[5]The principal commercial acts are the Negotiable Instruments Law, the Sales Act, the Warehouse Receipts Act, the Bills of Lading Act, the Partnership Act, the Stock Transfer Act, the Trust Receipts Act and the Fraudulent Conveyance Act. Other acts deal with Business Records, Attendance of Witnesses, Narcotic Drugs, Criminal Extradition, and Vital Statistics. The whole list of Uniform Acts with date of adoption in the states is in the Uniform Laws Annotated.

service by qualified experts and constant, detailed criticism during the drafting process.

The American Law Institute[6] is a bar association with a select membership of elected and ex officio judges, lawyers and law professors associated for the improvement of the law. Its organization in 1923 was the outcome of the work of a committee assembled in 1920 under Elihu Root as Chairman and including George W. Wickersham, Harlan Fiske Stone, Benjamin Nathan Cardozo, Learned Hand, Cuthbert W. Pound, James Byrne, John W. Davis, Russell C. Leffingwell, Samuel Williston, Roscoe Pound, John H. Wigmore, William Draper Lewis and a few others. The first director was William Draper Lewis.

The Institute began its work with the Restatements of the Law to which the Carnegie Corporation contributed over $2,400,000. Subsequent enterprises of the Institute have involved work for continuing legal education for which the Carnegie Corporation gave $250,000, and the preparation of Model Acts and Codes, including one on Criminal Procedure, the Youth Correction Act, the Model Code of Evidence, the Federal Income Tax Statute, the Uniform Commercial Code, the Model Penal Code, and the International Law Study. The last two are unfinished. The Institute publishes the Practical Lawyer.

In addition to the gifts already noted, the Institute received over $100,000 from various businesses for the Commercial Code, over $300,000 from the Maurice and Laura Falk Foundation for the same purpose and currently is receiving other gifts including substantial donations from the Mellon Foundation.

The President of the Institute is Harrison Tweed, the Chairman of the Council, George Wharton Pepper, and the Director, Honorable Herbert F. Goodrich of the Third Circuit Court of Appeals. The Council of the Institute meets annually in New York to consider the agenda for the annual meeting in Washington in May, where the current projects of the Institute are reported, debated and acted upon.

The Uniform Negotiable Instruments Act was promulgated in 1896, the Sales Act and the Warehouse Receipts Act in 1906, the Stock Transfer Act in 1909. From the beginning there has been serious adverse criticism of the Negotiable Instruments Law and today its inadequacy is generally admitted. The pattern of the Sales Act is unsatisfactory to many and part of it does not accord with modern business needs. The Nationl Conference had made a few attempts at revisions of some of its commercial statutes, but no real reform was accomplished. As early as 1940 the Merchants Association of New York, now the New York Chamber of Commerce, considered the Sales Act so

[6]Goodrich, Story of the American Law Institute, Washington Univ. L. Q. 283 (1951).

inadequate that it proposed a Federal Sales Act. When this was not adopted, the Association pressed for a Revised Uniform Sales Act. President William A. Schnader[7] was then President of the National Conference and was also a member of the Council of the Law Institute. He was familiar with complaints about the anachronisms in existing commercial legislation and of the great need for uniformity in several areas, especially security, either not covered at all or only partially by the recommended uniform acts, many of which had been ignored by the states. He made the challenging suggestion that the Conference abandon piecemeal legislation and undertake the drafting of a comprehensive commercial code in whch work the American Law Institute would be invited to participate. While the expenditures of the Institute, running to $3,000,000 more or less, appear and are substantial, they do not seem so large when it is considered that they represent large-scale activities during more than thirty-seven years. Nevertheless, in comparison with the National Conference, it was obvious that the Institute could command resources far beyond the reach of the Conference. It was doubtless assumed that the Institute would not only pay most of the cost of the drafting of the Code but have the major responsibility for its preparation. It was always a cooperative undertaking and the Conference members had opportunity to criticize and influence the draft, both at regular meetings and through affiliation of its members with the various advisory groups, but the Code is an Institute product, approved and supported by the Conference.

William Draper Lewis, the first director of the Institute, established from the start of the restatements a procedure calculated to procure the best possible results in draftsmanship that could be obtained with available personnel. For each project he appointed as reporter a man accepted as an expert in the field. For example, Samuel Williston was the reporter for the Restatement of Contracts. This reporter was provided with law clerks and secretarial assistance. It was the reporter's function to draft the restatement. However, there was also a group of advisors, traditionally about equally divided among judges, professors and other lawyers, and these were eminent persons in their fields who also were willing to devote time and energy to the purpose of the Institute. Instead of waiting until the restatement was complete, or complete in considerable part, it was the duty of the reporter, after an agreement on the outline, to furnish the advisors continuously his draft in convenient installments. When there was enough material for a group discussion, which might be a week-end or a week, the advisors met in conference with the reporter. The reporter was paid not extravagantly but enough to justify the Institute in expecting a considerable part of his time. The advisors were

[7]Formerly Attorney General of Pennsylvania.

paid expenses and a nominal honorarium. Mr. Lewis, realizing that the advisors in their own or near-by cities, would be subject to professional and domestic demands, shrewdly arranged wherever it was possible to have the conferences at comfortable resort hotels, where in his amiable way, he proceeded to make everyone work about a double day with no overtime. Each year the reporter delivered an installment to the Council and defended it orally and the process was repeated before the Institute as a whole. No drafting process is perfect, and, of course, none is better than its operators, but the Institute's procedure did insure critical scrutiny of semantics, a constant solution of ambiguities and where pertinent, a broad consideration of business and economic practices and background.[8]

The drafting of the Uniform Commercial Code was based on the practice of the Institute in drafting the restatements and its earlier codes. There was a chief reporter and an associate reporter for the Code as a whole and reporters for the several articles of the Code.[8a] This drafting

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[8]It was at least profoundly educational to those who participated, including members of the Institute. Something of the quality of the review of the work of the reporter may be gained from my recollection of the Restatement of Security, for which I was Reporter. The advisors included Judge John D. Wickhem, Wisconsin Supreme Court; Cornelius W. Wickersham, Cadwalader, Wickersham, and Taft of New York; William C. Cannon, Davis, Polk, Wardwell, Sunderland and Kiendl, New York; Professors Alexander Hamilton Frey, Rollin Perkins, and Gerhardt Husserl. Professor Husserl had been dean of the Kiel law faculty. Mr. Lewis always attended and sometimes Mr. Pepper and Judge Learned Hand. Active members of the Council included Chief Judges Sidney Smith of Mississippi, Faville of Iowa, Burch of Kansas, Federal judges Learned Hand, Augustus N. Hand, Fee, Goodrich, Hutcheson, Parker, Phillips, and Swan, and among other lawyers, John W. Davis, George Wharton Pepper, Monte M. Lemann, Charles E. Dunbar, Jr., Walter P. Armstrong, John G. Buchanan, and Henry Upson Sims. This listing is meant as much more than a reminiscence. It shows the sort of intellectual test to which anything offered with the indorsement of the Institute is subjected. It should be emphasized that the members of the Council and of the Institute itself are for the most part active, conscientious participants.

[8a]The chief reporter was Professor Karl Nickerson Llewellyn, then of the Columbia Law School and now on the Chicago law faculty. The associate reporter was Soia Mentschikoff, now a professor at the University of Chicago. The introduction to the 1957 edition of the Code names all the active participants. Counting the revisions, about fifteen years has been devoted to the Code. Each state, therefore, is offered without cost the product of research and writing for which an actual outlay of about half a million dollars has been spent, not counting the value of time given by lawyers to whom clients would be asked to pay millions for equivalent services.

One comment may be made to those who may wonder why, if the Code has such excellence, the New York Law Revision found so many imperfections and why its Editorial Board so promptly made such extensive revisions. The draftsmen of the Code during the first six years could not be unaffected by the import of the war upon all civilian enterprises. To meet what may have been too ambitious a deadline, while basically sound, the Code until the New York Law Revision study and the subsequent review by the Editorial Board and its consultants, never had the critical scrutiny both as to detail and internal consistency that it deserved. It is not my purpose to review any of the early debate as to the selection of certain advisors. It may be that at the outset, there was a certain tendency to seek discipleship rather than independence. Once a program has been adopted, progress is only possible if there is general sympathy with the overall pattern and objectives. Even lawyers of high expertness, if already dogmatically committed to certain viewpoints, may not be desirable collaborators. On the other hand, the goal of easy unanimity

and editorial work was in general charge of an Editorial Board composed of members of the Institute and the National Conference. The chairman was the Honorable Herbert F. Goodrich of the Third Circuit Court of Appeals. The Code as drafted was reviewed by the Council of the Institute and by two sections of the Conference. The Code in its final form had nine articles, including an article on definitions, and contemplated that the states would include a tenth article repealing conflicting laws. Seven uniform laws, as revised, are now a part of the Code, viz., Negotiable Instruments, Warehouse Receipts, Sales, Conditional Sales, Bills of Lading, Stock Transfer and Trust Receipts. Two statutes, Factors' Lien and Bank Collections, previously enacted by many states, but not in the Conference list, are incorporated in the Code. The Code thus was composed of Article 2, Sales; Article 3, Commercial Paper; Article 4, Bank Deposits and Collections; Article 5, Letters of Credit; Article 6, Bulk Transfers; Article 7, Documents of Title; Article 8, Investment Securities and Article 9, Secured Transactions. The Code after more than ten years work was submitted, upon approval by the sponsoring organizations, to the states in 1952 and adopted in Pennsylvania in 1953. The New York legislature referred the Code to the New York Law Revision Commission for study and report. The Commission set up an advisory group of consultants, made an elaborate study of the whole Code, conducted hearings, and reported in 1956. Then, while it supported the general plan of the Code, it did not recommend the enactment of the Code in New York in its existing form. In the meantime, the Institute and the Conference reactivated its Editorial Board, which with the assistance of committees in respect to the several articles, undertook a revision of the 1952 draft in the light of criticism by the Law Revision Commission and others. A new draft was prepared and published with comments in 1957. Some further amendments were added to Article 8 and 9 in 1958. This Code as revised has been adopted in Massachusetts, Kentucky, Connecticut, and

may be at the cost of neglecting issues that if not resolved by the draftsmen will be raised when the Code is offered for enactment. It should be noted that in the revision of the 1952 draft, the number of participants was both increased and further diversified. While the Code in process was currently reported to all sorts of bar and business groups, it was still unfamiliar to the legal and business public when it was finally reported in 1952. Both the Institute and the National Conference have traditions of offering their conclusions to the Bar without pressure and propaganda. Praiseworthy as is that attitude, it may be that those responsible for the Code and familiar with it could have done more as a matter of public relations. Such criticisms, however, belong largely to the past; and it may be asserted confidently that the Code in its present form represents so much excellence and so much improvement in existing law and administration that no opponent is entitled to attention unless he has become familiar with the Code by conscientious study of it. While some issues of policy may fairly be raised as to some matters in the Code, while intelligent persons may differ as to the expression of some rules of the Code, while imperfections may still be found, too much of the opposition, as the New York hearings disclosed, comes from persons who believe that the desirability of uniformity in state commercial law is still debatable, or whose arguments relate not to the Code as it is, but to something in their imaginations. See Hanna, Security 65 (1959).

New Hampshire and has progressed through part of the legislative process in other states. It is interesting to observe that while the revised draft of 1957 as amended in 1958 has sharpened definitions, eliminated inconsistencies and ambiguities and in some cases has made what appear to be desirable policy changes with some commendable additions, the Pennsylvania experience with the original draft of 1952 has been so satisfactory that there has been no haste to enact the improvements.[9] Mr. Schnader has reported many favorable opinions among Pennsylvania lawyers, bankers and others. Several of these opinions represent an admitted change from earlier skepticism.

II. ARTICLE 9 – SECURED TRANSACTIONS

The American public through the acts of all states and territories as to bills and notes and by three-fourths of the states as to sales has accepted the policy of state uniformity in these fields. Personal property security is a part of many financing and merchandising transactions. Every argument relevant to uniformity of law in negotiable instruments and sales is applicable to security. Indeed, there may well be greater need for statutory uniformity in security than in the other two fields because without statutory uniformity in the latter, decisions would approximate uniformity much more nearly than in respect of security. Contemporary security law, while it has been modernized for particular situations in some states by uniform and other laws, such as the Trust Receipts Act and the Factors' Lien laws, still presents a chaotic diversity among the states and senseless technical distinctions within the states. If civil procedure were still based on forms of action, it would not be more anachronistic than existing security law in most jurisdictions. So general has been the sentiment for a uniform security law that from the time when the rather inept first drafts were made public, the provisions of what is now Article 9 were examined critically by a wide representation of bank and finance company lawyers, judges and professors, and the draftsmen were currently acquainted with these criticisms. Without underestimating the intelligent work devoted to other articles, it is my opinion that Article 9 has been subjected to more expert study than any other part of the Code. It has received much support from professional and business groups not ready to commit themselves to the Code as a whole. Thus certain interests in some states, notably California, have endeavored to obtain the passage of Article 9 in advance of or irrespective of the adoption of the Code as a whole.[10] The net result is that the final

[9]Pa. Senate Bill No. 689, approved Oct. 2, 1959, effective Jan. 1, 1960, incorporates the 1957 - 1958 revisions.

[10]It might seem that Article 9 could be altered in detail so that it could be enacted separately. This task, as the California effort has demonstrated, is more formidable than first appears. The fact is that Article 9 is a part of the Code and mere verbal changes do not give it unity in itself. It may be admitted that its sepa-

draft of Article 9 has been refined so that it not only preserves its original admirable pattern of an integration of legal rules with modern economic needs and realities but organizes the rules logically and states them with exceptional clarity.

Starting with comparatively modern times the notion of security had two aspects. The debtor either delivered something he owned to the creditor or without a delivery he conveyed ownership or a lien. Even on such a simple category as the first, a book could be written. Does the creditors' possession need to be continuous? To what extent can delivery be made by the formal evidence of property, for example, an insurance policy? When and how can the creditor change his possession into a money equivalent? When non-possessory security is involved can the subject matter be a fluctuating mass, that is, an inventory? Some states say that a security transfer of a stock of goods is a fraudulent conveyance. Can a debtor make a presently effective transfer of what he does not own but expects to acquire? Since many situations seemed to be outside existing security rules, certain creditors either tried to get courts to recognize novelties or to induce the legislatures to make some provision for their special needs. Such legislation, if enacted, might be restricted only to the special situations. Security lawyers had to advise as to the relation of the security device to the situation. If the wrong device was used, the security was invalid, or if the right device was used but perfection or enforcement belonged to another device, the creditor could again lose. Many judicial rules and some legislation belonged to a period when the distribution of goods was simple and local and when the modern credit economy was unknown.[11] This paragraph has been written partly in the past tense, but for the most part except where the Code has been adopted, it is still American law. Article 9 recognizes that in our modern credit economy working capital for the distribution of goods and services must be obtained by borrowng. Such borrowing is not only a necessity, it is desirable. Creditors should be protected so that the savings of the community may safely have a share in providing credit. At the same time borrowers must be assured against unfair exactions. If security devices are simple and effective, the cost of credit is less expensive and the whole economy benefits. All that remains is to see that the debtor-creditor relationship cannot be used unfairly to others who deal with the

rate enactment would be a desirable reform of the security law of any state, but a public sentiment that could convince a legislature of the truth of this assertion could scarcely fail to be equally persuasive as to the merits of the Code as a whole.

[11]See Braucher, The Legislative History of the Uniform Commercial Code, 58 Col. L. Rev. 798 (1958); Coogan, Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien," 72 Harv. L. Rev. 838 (1959); Contract Rights as Commercial Security: Present and Future Intangibles, 67 Yale L. J. 847 (1958). Mr. Coogan observes that household appliances are the modern substitute for hired help, and it is natural that their capital cost, like wages, should be paid by the week.

parties, particularly with the debtor. What Article 9 says in substance is that so far as personal property is concerned, a borrower can use any of it as security, that borrower and lender can make any bargain they wish subject only to certain stated rules designed to assure fairness between the parties and such public notoriety as may be appropriate in the circumstances.

Is it accurate to call Article 9 revolutionary? If one finds a body of law accumulated throughout centuries, filled with obsolescence, stated in part in terms of abstractions, containing different rules applying to what are functionally the same situation, but including a considerable fraction of contemporaneous utility, and decides to wipe out the whole expression of this legal field, the reform is drastic, if not revolutionary. That substantially is what has been done in Article 9. However, if after abandoning the state law in statute and decision, you carefully consider all the proper practices under existing law and write a single statute, whose rules permit all these practices to continue and to expand in accord with economic realities, there is little substantive change and what is done is not at all revolutionary. People merely can go on doing what they have done before without complying with technical anachronisms, without insurance against entrapment and without paying miscellaneous tolls to the obsolete. This in brief is the contribution of Article 9 to the law of security.

III. SCOPE AND SUMMARY OF ARTICLE 9

A. General Analysis of Article 9

Modern business is characterized by extensive production and distribution with small unit profit. The tax burdens are onerous on all business and taxes must be settled in cash. The returns from production, even when credit is not allowed to buyers, are necessarily removed at some distance in time from the date when expenditures for labor and supplies, especially the former, must be made. All this demands generous amounts of working capital, often in excess of that which can be supplied out of the reserves of the enterprise. Similar factors exist even in respect to small business and farming. Furthermore, in our economy profitable opportunities for expansion can be utilized frequently only if outside credit is available. At the retail level, distribution of the more expensive items of consumer goods sold on arrangements for installment payment, involves the extension of credit.

Lenders of credit, while willing to accept certain risks as to a borrower's integrity, naturally desire security against the failure of the borrower's undertaking, or other inability to pay. The cost of credit includes both the current rental of the credit and insurance against loss.

To the extent that security can be obtained, the implicit premium charged as insurance in the interest rate can be reduced. The amount of security that can be provided by real estate is severely limited, even if one overlooks the fact that the real estate of a business gets its chief value as the property of a going concern. Real estate is frequently encumbered for the benefit of those who have made initial contributions to the fixed assets of a business. Finally, the liquidation of real estate is slow and expensive. These circumstances emphasize the significance of personal property as security for credit, especially for short term credit. The business personal property available as security consists largely of goods sold in manufacture or other production; or in the current products and accounts and instruments arising from the sale of products. If the purposes of the credit are not to be defeated, it is essential that the subject-matter of the security be left largely in the possession and subject to the disposition of the borrower. Otherwise, the smooth functioning of the business will be impeded and the cost of credit become prohibitive. At the same time, credit and security arrangements should operate fairly in respect of interested parties.

The law of security as a whole consists of rules of property and contract as modified by rules and principles of equity and affected by the law of fraudulent conveyances. Equitable rules, indeed, may not only modify the arrangements the parties have made but may nullify them in various circumstances. These equitable rules may have been codified by statute in respect of certain transactions, although not as to others to which they are perhaps equally applicable.

The present security law involves a constant inquiry as to title. Sometimes the title is in the creditor, sometimes in the debtor with the creditor having a legal or equitable security lien.

Article 9 of the Commercial Code recognizes first the utility and respectability of personal property security. Second, it states the unitary character of such security while accepting the necessity of certain variations of rule depending upon functional differences. Third, since much American business is interstate, it provides a statute intended to be the law of all the states and thus to facilitate business and legal predicability. The real change under Article 9 is the abandonment as a matter of legal terminology of all existing personal property security devices and in stating rules in terms of a security interest, rather than in terms of pledges, chattel mortgages, conditional sales, bailment leases, factors' liens, trust receipts, assignments of accounts, equipment trusts, leases intended as security, and other lien and title retention contracts. This approach eliminates a host of technicalities now relating to the several compartments of security law.

Article 9 is intended to cover practically the whole field of personal property security (9-102). Exceptions are stated (9-104) in respect of (a) the Federal Ship Mortgage Act of 1920 and other Federal statutes regulating the rights of persons in transactions as to particular types of property; (b) landlords' lien; (c) statutory and other liens for services and materials, although these are subject to certain rules stated in 9-310; (d) wage assignments; (e) equipment trusts on railway rolling stock; (f) transfers of accounts in connection with the sale of a business or a transfer of a contract right to one who is also to perform under the contract.

Two additional observations are important in relation to the general coverage of the Article. The first is that by Section 9-102 (1) (b) the new statute applies to financing sales of accounts, contract rights or chattel paper. For example, a factor often buys without recourse accounts receivable for a price which in reality but not in terms includes both interest on the amount paid and a premium for credit insurance. Another similar situation is where a finance company buys the notes and chattel mortgages or conditional sales contracts of an automobile or other dealer.

A second qualification as to the scope of the Article is that it is not intended to prevent a state from continuing in effect such statutes as those regulating pawnbrokers, installment selling or providing as to the consequences of usury. Many other laws dealing with the licensing or other conditions for the operation of particular businesses have no necessary conflict with Article 9. It may also be noted that while so far as security is concerned Article 9 eliminates existing distinctions among the security devices, parties may still employ old methods and the methods they employ may have consequences not connected with security. For instance, Article 9 does not make its rules depend upon title. However, from other legal viewpoints, title may be in one or the other party, depending upon the actual nature of the transaction. In the administration of tax and liability statutes, to mention only two instances, the location of title may still have significance.

Just as certain priorities may be affected by purchase money situations, so they may depend upon certain other functional differences. Section 9-109 lays the basis for the latter by stating four classifications of goods, viz., consumer goods, equipment, farm products and inventory. "Consumer goods" (9-109 (1)) are those used or bought primarily for personal, family or household purposes. Illustrations include radio and television sets, refrigerators and pleasure cars. "Equipment" is used or bought primarily in business, including farming or a profession. In this category is also what is acquired by a nonprofit organization or governmental agency. In general, equipment includes what does not come within the other three categories.

"Farm products" are crops or livestock used or produced in farming operations. Included are products of crops or livestock in unmanufactured states, such as ginned cotton, maple syrup, milk and eggs in possession of a debtor from whose farming operations they are derived. "Inventory," excluding farm products and equipment, consists of goods held or prepared for sale, to be furnished under a contract of service, or raw materials, work-in-process or materials used or consumed in a business.

B. Creation of Security Interest

The general idea of Article 9 is that a security agreement is effective according to its terms as to everyone except as provided in the Code or by some other law or regulation, such as those relating to usury, small loans, retail installment sales (9-201). The provisions of the Code are not dependent upon the location of title (9-202). The basic condition of enforceability (9-203) is that the collateral either is in the possession of the secured party or the debtor has signed a security agreement which contains a description of the collateral and where the security covers crops, oil, gas, or minerals to be extracted, a description of the land concerned. These simple provisions eliminate a host of technical requirements now in force as to acknowledgment, affidavits and the like. Description is sufficient (9-110) if it reasonably identifies the thing described.

The security interest attaches if these things coincide, viz., the agreement, value for the one secured, and the debtor's interest in the collateral, 9-204. Carrying out the last item, crops must be planted or be otherwise growing crops, young of livestock must be conceived, fish must be caught, timber cut, and oil, gas or minerals extracted. An interest in a contract attaches when the contract is made, in an account when it comes into existence.

Section 9-204 (3) is an after-acquired property clause. This is subject to two limitations. It is contemplated that a state provide a limitation for the application of after-acquired property clauses to crops, except that such agreements in connection with a lease, land purchase mortgage or contract may continue during the period of the real estate transaction. In respect of consumer goods, no after-acquired interest attaches, unless they are acquired within ten days after the secured party has given value. A security agreement may provide that the collateral under it shall secure future advances (9-204 (5)).

The creation of a security interest is valid even if the secured party allows the debtor to use or dispose of part of all of the collateral or its proceeds (9-205). This goes all the way in repealing the rule of *Benedict v. Ratner*.[12]

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[12] 268 U.S. 353 (1925). The Code does not repeal Benedict v. Ratner as a bankruptcy rule but repeals state law given effect by the case.

C. Interests of Third Parties—Priorities

From the standpoint of the secured party one can consider priorities as to perfected and unperfected security interests. Perfection is by possession or filing. Third parties involved are various sorts of purchasers, including the buyer in ordinary course of business against whom certain security interests are not intended to be effective, other holders of security interests and various sorts of lien creditors. Broadly speaking, Article 9 preserves most existing rules of security priorities although there are certain exceptions and several instances where new rules of perfection are established. As a matter of legal forms now in use, the least change will be necessary in connection with pledges and assignment of accounts. Current forms relating to chattel mortgages and conditional sales are rendered largely obsolete. Forms for trust receipts and factors' liens could be used although some of their terminology will have little significance under the Code. An unperfected security interest somewhat obviously is subordinate to the rights of one to whom a perfected security interest is subordinate; for example, buyers in ordinary course of business of inventory and in certain other situations, as well as purchasers in good faith for value of various negotiable instruments and documents (9-301 (1) (a)). A subsequent secured party without knowledge and who first perfects his own security interest may take priority of an earlier secured party (9-301 (1) (b)). This resolves a dispute in many jurisdictions by establishing that the later security interest must itself be perfected first as a condition of priority. A similar provision is stated (9-301 (1) (c)) as to lien creditors. The Code provision requires the lien creditor to become such without knowledge at the time of acquiring his lien, not at the time of becoming a creditor.

A transferee in bulk or other purchaser not in ordinary course of business, who receives delivery without knowledge of the security interest and before it is perfected is also preferred to an unperfected security interest. However, 9-301 (2), there is an exception to this rule as to transferees in bulk and lien creditors in case of a purchase money security interest which is perfected within ten days of the time when value is given.

A lien creditor includes an assignee for the benefit of creditors, trustee in bankruptcy and a receiver in equity. A lien creditor is such from the time of issuance of process that results in levy or attachment. The personal knowledge of a representative of creditors is irrelevant unless all creditors have knowledge of the earlier interest. So far as the Bankruptcy Act is concerned, this knowledge of all creditors would not affect the position of the trustee in bankruptcy.

When a secured party has possession of goods, instruments, documents or chattel paper as collateral his interest is perfected without

filing (9-305). So if collateral is held by a bailee, perfection is from notification of the secured party's interest.

Where a statute of the United States provides for national registration or filing of all security interests in property subject to a security interest, the Code does not require supplemental filing.

A perfected security interest may be subordinate to the rights of a buyer in ordinary course of business of inventory and of other goods when the financing statement shows the secured party claims a security interest in proceeds. Knowledge by the buyer of the terms of the security agreement does not affect the buyer's position.

As to farm equipment having a purchase price not in excess of $2500 and as to consumer goods, where a purchase money security interest may be perfected without filing (9-302 (1) (c), (d)), but one who buys without knowledge such goods for his personal, family household or farming purposes, takes free of the security interest unless a financing statement is filed (9-307 (1), (2)).

In the case of chattel paper not in the possession of the secured party, filing perfects a security interest against creditors of the debtor and all transferees except a purchaser for new value in ordinary course of business who takes possession of the paper without knowledge of the security interest in the specific paper (9-308).

Filing of course does not constitute notice of a security interest in negotiable instruments or negotiable documents of title, or securities, against holders in due course and bona fide purchasers (9-309).

Section 9-310 settles the controversy as to the priority of such security interests as chattel mortgages and conditional sales against holders of common law or statutory liens for goods and services, for example, artisan's, repairman's or agister's liens. The Code prefers the latter to perfected security interests when the services or materials are furnished in ordinary course of business. This eliminates in many states controversy as to whether there is express or implied consent by the secured creditor to subordinate his interest.

Article 9 contains five general sections (312-316) relating to conflicting security interests. In general an interest which attaches after filing takes priority from the time of filing but this rule is subject to several qualifications (9-312 (1)). If the security agreement contains a future advance clause and later advances are made on the same collateral, priority depends upon the original perfection (9-312 (2)).

The same principle applies where there is an after-acquired property provision. It is not necessary for new advances to be made on the after-acquired collateral (9-312 (3)). If the after-acquired property is acquired under a purchase money security interest which is perfected within ten days from the time the debtor receives the property, the

purchase money secured party has priority.

A somewhat similar provision exists (9-312 (2)) as to crops. A later secured party who makes an advance, incurs an obligation, redeems a perfected security interest or gives new value to enable the debtor to produce the crops, has priority. The new security interest must arise during the production season or not more than three months before the crops are planted or before they become growing crops. The priority only applies in respect to secured obligations where due more than six months before the crops are planted or otherwise become growing crops (9-312 (2)). This recital sounds complicated but may not be difficult to apply to a particular situation. These provisions reduce to a considerable extent the control by a creditor obtained through an after-acquired property clause.

Where goods become a part of real estate, a security interest in the goods takes priority over interests in the realty, except that bona fide purchasers of the realty, subsequent judgment lien creditors, and prior encumbrances who make new advances, may have priority if their position is consumated without knowledge of the security interest in the goods and before its perfection. A purchaser, at a foreclosure sale, not a prior encumbrancer, is a subsequent purchaser within this section (9-313 (1) (a), (b), (c)).

A real innovation is effected by 9-313 (5) in allowing a secured creditor having priority in goods affixed to real estate to remove the goods irrespective of possible injury to the realty. Such secured party, unless the encumbrancer or owner of the real estate has consented to the removal, must pay the cost of repair (not diminution in value caused by removal) and may be required to give advance adequate security for such performance. This section abandons the "material injury" rule which now prevails in many jurisdictions.

Where accounts have been assigned, unless the account debtor has made an enforceable agreement not to assert defenses against an assignee (9-206), the assignee is subject to the terms of the contract between account debtor and assignor, and any defenses under it, including any other claims or defenses which arise before the account debtor is notified of the assignment or arrangement for the assignment (9-318 (1) (a), (b)).

Article 9 nullifies prohibition against assignments of accounts or contract rights (9-318 (4)). This subsection is an innovation in the law of New York and about 17 other states. An account debtor may require reasonable proof of assignment and until this is furnished may pay the assignor.

D. Filing

Valid security interests in one state in property brought into another

state are effective for four months without new perfection. Then they must be perfected. If perfected after four months, perfection dates from the time of new perfection. If the parties understood at the time of the security agreement that the property was to be taken within 30 days to another state, the validity of the interest depends upon perfection in the latter state, otherwise, with the qualification mentioned, perfection is in accordance with the rules of the first state (9-103 (3)).

The chief place of business of a debtor owning equipment normally used in more than one state, determines the state whose law governs the validity of perfection of security interests in such property. The comment indicates that problems will frequently arise where it is difficult to apply the filing rules of the Code in respect of multi-space enterprises. Such problems, of course, are not created nor made more difficult of solution by anything in the Code.

Article 9 adopts the present practice under the Uniform Trust Receipts Act of provisions for central filing in the office of the Secretary of State of financing statements in respect of accounts (except for sale of farm products by a farmer), chattel paper, contract rights, inventory or equipment (excepting equipment used in farm operations). An additional county filing, not essential for uniformity, may be required if all the debtor's places of business are in a single county.

Where the collateral is consumer goods, farm products, farm equipment, and farmer's sale accounts, filing is in the county of the debtor's residence, if a resident of the state. If not, in the county where the goods are and, in addition, in the county where the crops are grown. If the goods are affixed to real estate, security interests must be filed in the county where the real estate is located (9-401 (1) (a), (b), (c)).

Section 9-402 states the requisite contents of a financing statement for filing and suggests a feasible form. Financing statements must be signed by both parties unless what is involved is a new perfection of a security where already perfected. No requirements of affidavits or acknowledgments are included.

E. Enforcement

Article 9 recognizes enforcement of a security interest by power of sale or judicial foreclosure. The secured party not in possession also is entitled to possession in order to exercise a power of sale. In general these remedies are now available to secured creditors.

A secured party after default may sell, lease or otherwise dispose of collateral, either as is or by following any commercially reasonable preparation or processing. Proceeds shall be applied first to reasonable expenses, then to the satisfaction of the secured indebtedness, and finally to the satisfaction of any subordinate security interest if written notifica-

tion of demand is received before distribution of proceeds (9-504 (1) (a), (b), (c)).

Disposition may be at public or private sale or may be as a whole or in parcels so long as the method and terms are in every respect commercially reasonable. Except as to perishable collateral, or one which threatens to decline speedily in value, or is of the sort customarily sold in a recognized market, reasonable notification of the time and place of any public or private sale or other intended disposition must be given to the debtor and to any other secured party who has filed a financing statement or who is known. The secured party may buy at any public sale and also at a private sale if the collateral is sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations.

This section simplifies enforcement proceedings by eliminating detailed rules as to public sale, restrictions on purchase by creditor and the like. What the Code now provides as a matter of law is usually a matter of contract in secured transactions. The Code obviously cannot settle in advance questions of fact as to what in particular circumstances are reasonable methods of disposition of collateral.

In the case of purchase money security, if the debtor has paid sixty per cent of the cash price, and has not signed after default a signed statement renouncing his rights, a secured party must dispose of the collateral as required by 9-504. If the secured party fails to do so within 90 days after he takes possession, the debtor may recover in conversion or enforce liability as provided in 9-507.

In any other case, the secured party after default may propose to retain the collateral in satisfaction of the obligation. Written notice shall be given to the debtor and to any other secured party who has filed a financing statement or whose interest is known. If the debtor or secured person objects within thirty days, the secured party must proceed to dispose of the collateral. The debtor may reclaim before disposition, contract for disposition or discharge of the obligation by retention of the collateral, by tendering payment of all sums due including expenses reasonably incurred by the secured party. (9-506).

IV. SOME ASPECTS OF THE EFFECT OF THE UNIFORM COMMERCIAL CODE ON MISSISSIPPI SECURITY LAW

Article 9 codifies much of the common law as to pledges and supersedes most of the statutory law relating to chattel mortgages, conditional sales, non-possessory factors' liens, consignments or leases of personal property as security, trust receipts and assignments of accounts receivable. Among these subjects only conditional sales and trust receipts are governed by uniform laws, although factors' lien acts and accounts receivable statutes, more or less similar, have been enacted in many

states. Mississippi has enacted the Uniform Trust Receipts Act,[13] a Factors' Lien Act,[14] and a filing act for assignments of accounts receivable.[15] Further reference will be made to these and other Mississippi laws. Article 9 contains several provisions not generally found in present state laws on the subject of the security transfers of contract rights and other intangbles. As has been stated, Article 9 does not require the repeal of regulatory statutes as to usury, retail installment sales and small loans. One innovation already noted is that Article 9 applies to financing sales of accounts as well as to security assignments. Some finance companies, especially "old line" factors, make a practice of buying accounts of their customers, assuming the responsibility for collections and thus in effect providing credit insurance. While such sales are nominally without recourse, the purchase price gives the financing buyer a generous margin of safety. To make the transaction more acceptable to customers, the financier usually provides a reserve fund, which if collections are satisfactory is shared with the seller of accounts. Article 9 regards such arrangements as security transactions.[16]

While one who does not practice law in a particular state may easily fall into errors as to local business practice and the application of legal rules, it seems that if the Code were adopted in Mississippi practically every concept, rule or device of Article 9 would find a parallel in Mississippi's law relating to separate security devices. The Code, for example, embodies practically all of the provisions now found in the Mississippi law of trust receipts and factors' liens, although the Code rules are somewhat broader of application. Much of the mechanism of the Code will be familiar to the Mississippi lawyer from his pre-Code practice. The essential ideas of the Code are not new and even the novelties of its terminology, being based as they are upon business usage, present no real problem to the commercial practitioner.

A. Pledges

The Mississippi law of pledges is largely the common law with some modifications because of certain provisions in the Trust Receipts Act.[17] The Trust Receipts Act permits a security interest in goods, documents or instruments to be valid for thirty days without possession or perfection. The Code[18] applies to instruments or documents and makes the period twenty-one days, perhaps to correspond to the Bankruptcy Act provision as to perfection.[19] One important use of the pledge is in con-

[13]Miss. Code Ann. §§ 5080-01 to 5080-23 (1942).
[14]Miss. Code Ann. §§ 382-11 to 382-20 (1942).
[15]Miss. Code Ann. §§ 243-01 to 243-10 (1942).
[16]UCC § 9-102 (1) (b).
[17]Miss. Code Ann. §§ 5080-03, 5080-08 (1942).
[18]UCC § 9-304 (4), (5).
[19]Bankruptcy Act, § 60 a. (7) (11 U.S.C. § 96 a. (7)).

nection with field warehousing. This is an arrangement whereby a borrower leases a part of his own premises to a warehouseman at a nominal rent so that warehouse receipts may be issued without removing the goods to another place of storage. The warehouse receipts are then pledged by the owner of the goods. Such a device is valid if honestly conducted and if there is notoriety given to the transaction by signs on the premises. It is the practice today for certain corporations to engage in the business of leasing such space offered for storage. The corporation issues the receipts and supervises the transaction. Article 9 originally proposed to require the filing of field warehouse pledges, but this provision was dropped in the 1957 revision. Mississippi has no special law on field warehousing but apparently the practice is accepted.[20]

B. Chattel Mortgages

Mississippi security statutes, as is true generally, relate to particular security devices which are valid only in certain situations, whereas the Code broadly permits the parties to create a security interest in any personal property by a simple agreement although the perfection of the interest and its priority may depend upon the subject-matter, for example, whether it is consumer goods, inventory or crops. As has been noted, one of the Code's most significant changes in security law of many states is the sanction it gives to after-acquired and future advance clauses, even when the debtor is allowed to sell and retain proceeds of the security. Mississippi has been comparatively liberal in the recognition of after-acquired property security so that the Code would make fewer substantive changes here than in many other states.

The limitations of space do not permit a review of all the details in which the Code would amend Mississippi law but a few comments about particular Mississippi statutory provisions may be illustrative.

Section 851 of the Mississippi Code[21] allows a deed of trust or mortgage on all chattels of a named class described as to locality and of like land acquired within three years. Merchandise is excluded from the section. It does not in terms authorize the mortgagor to retain proceeds although this is allowed in connection with assignment of accounts receivable.[22] This section obviously is intended primarily to facilitate livestock and crop loans. The Uniform Code provisions would require little change in actual practice. While the Code proposes a one-year vali-

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[20]See Nasif v. Lawrence Warehouse Co., 122 F. Supp. 562 (S.D. Miss. 1954), *aff'd* 219 F.2d 536 (5th Cir. 1955). See also Bostian v. Park Nat. Bank, 226 F.2d 753 (8th Cir. 1955); Security Warehousing Co. v. Hand, 206 U.S. 415 (1906); Friedman, Field Warehousing, 42 Col. L. Rev. 991 (1942).

[21]Miss. Code Ann. § 851 (1942).

[22]Miss. Code Ann. § 243-08 (1942). See Trenton Lumber Co. v. Boling, 230 Miss. 233, 92 So.2d 440 (1957).

dity for after-acquired clauses as to crops, except where the security is given in connection with the purchase of land,[23] the one-year period is not an essential aspect of uniformity. The Code gives priority to a creditor who gives new value to enable the debtor to produce crops.[24] It seems that the Uniform Code filing requirements[25] would require only formal changes in present Mississippi procedure.[26]

The Uniform Code would make a material change in the Mississippi rule as to foreign chattel mortgages, which now are binding as against creditors and bona fide purchasers, only when recorded in Mississippi.[27] The Uniform Code permits a security interest perfected in one state to continue perfected for four months after removal to another state.[28]

The Mississippi landlord's lien for rent apparently would not be affected by the Uniform Commercial Code.[29] It may be doubted whether the landlord's lien for livestock and implements furnished the tenant under existing law would be effective under the Code without further formality of execution and perfection although such a lien could be preserved specially at some cost to uniformity.

One minor change the Code would make in local law relates to fixtures. In Mississippi as in many states, a fixture may not be removed by a person claiming an interest in it if removal would do substantial damage to the premises. The Code allows removal subject to compensation for physical injury and security may be required as a condition of removal. This privilege does not apply to such materials as brick, lumber or glass incorporated into a structure. Since Mississippi rules relating to removal of fixtures are liberal the Code would make little change in actual operation of Mississippi law.[30]

C. Conditional Sales

Since the Uniform Commercial Code does not make its rules depend on title, these rules regarding what are now chattel mortgages and conditional sales, that is, where these are title or lien transfers, or title retention, are the same. This would affect Mississippi law in numerous procedural aspects. As has been stated the Code allows security interests in consumers goods and in farm equipment with a purchase price of not

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[23]UCC §§ 9-203 (1) (b), 9-204 (4) (a).

[24]UCC § 9-312 (2).

[25]UCC §§ 9-401 (1) (b), 9-402 (1) (3).

[26]Miss. Code Ann. § 884 (1942). See also § 863 relating to property removed to another county in the state, and § 869, priority controlled by record.

[27]Miss. Code Ann. § 870 (1942).

[28]UCC § 9-103 (3).

[29]Miss. Code Ann. § 908 (1942); UCC § 9-104. Cf. Miss. Code Ann. § 909 (1942).

[30]UCC § 9-313. See Anderson-Tully Co. v. U.S., 189 F.2d 192 (5th Cir. 1951); Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940); Virden Lumber Co. v. Sherrod, 167 Miss. 297, 139 So. 813 (1932).

to exceed $2500 to be valid against other creditors and all purchasers except those who buy in good faith for personal or household use. Since Professor Currie has already written about conditional sales, I shall make no effort to discuss some of the past and present Mississippi uncertainties in this field.[31] Mississippi now in connection with its regulation of motor vehicle installment contracts provides for recording of conditional sales in such connection.[32] The Code would not affect such regulations and would require little change in the motor vehicle security recording law.

D. Trust Receipts

The trust receipt in existing security law is a device available to one who finances a dealer in the acquisition of inventory. It is not available as security to the seller of inventory, to a dealer, nor to a lender on the security of existing inventory. The Uniform Act provides for central notice filing, that is, filing of notice of a course of dealing rather than of indivivdual transactions, and filing in the office of secretary of state or other official in the state capital. Mississippi in adopting the Uniform Act provided for local notice filing.[33] The Commericial Code, in effect, includes many provisions now in the Trust Receipts Act especially in respect of the proceeds of purchase money security in inventory. The Code states numerous rules in respect of inventory but it recognizes this purchase money security whether obtained by an independent financier or retained by a seller of goods. The Code also makes minor changes in the secured creditor's right to follow proceeds of inventory. As in the Uniform Act as adopted in Mississippi, an important feature of the Code is that a buyer in due course from a dealer is not subject to the security interest.[34]

Trust receipt financing, often referred to as "floor plan" financing, is used chiefly in the distribution of motor vehicles although it has a wider application and was originally used principally in connection with imports. Except to give the trust receipt rules a wider utility and remove the danger of losing a security interest because of attempting to employ a trust receipt outside its permitted use, the adoption of the Uniform Code would have little effect upon local trust receipt law.

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[31]See Currie, Recording Conditional Sale Contracts in Mississippi, 26 Miss. L. J. 273 (1951). In Mississippi the vendor of personal property has a purchase money lien while the property remains in the hands of the first purchaser or one who derives title with notice of unpaid purhase price. Miss. Code Ann. § 337 (1942).

[32]Miss. Code Ann. § 8075-01 (6) (1942).

[33]Miss. Code Ann. §§ 5080-01 to 5080-23 (1942). The procedure on filing is in §5080-13.

[34]UCC § 9-307. See Coogan, Article 9 of the Uniform Commercial Code, 72 Harv. L. Rev. 838, 845, 855 (1959).

E. Factors' Liens

The Factors' Lien Act as adopted in Mississippi in 1956[35] and as in force in about thirty other states is a good illustration of a statute that has considerable utility in special areas of security financing but which contains restrictions for which there seem little need and which includes ambiguously expressed requirements. The Code allows all the purposes of the statute to be accomplished without the restrictions or the ambiguities.

This is another statute relating to the financing of inventory and as has just been stated, it, unlike the trust receipt, is available to the lender on existing inventory. Like the trust receipt, the factors' lien is not available to the seller. Like the trust receipt the factors' lien is not valid against a buyer in ordinary course of business. Both the factor's lien and the trust receipt introduce into the law a considerable element of floating lien and this is continued and extended in the Code. The Mississippi law permits merchandise only to be given as security and merchandise does not include machinery, equipment or trade fixtures of the borrower. The borrower must be a wholesaler, presumably including manufacturer. It does not include retailing.[36] Perfection is by filing. The factors' lien can extend to accounts receivable and returned merchandise. As in most of these statutes the text makes it difficult to be certain as to the significance of the schedules of merchandise the borrower is expected to make after the written agreement creating the continuing lien. If Mississippi should adopt the Code, it would in effect keep all the beneficial provisions of its Factors' Lien Act.

F. Assignment of Accounts Receivable

Mississippi enacted in 1958 an act providing for local notice filing of certain accounts receivable assignments.[37] Aside from certain obvious exclusions such as sums due on contracts represented by negotiable and non-negotiable instruments and obligations secured by chattel mortgage and conditional sale, the Mississippi Act does not apply to sums due from the United States, or sums arising in public or private construction contracts for which the assignor has furnished a payment or performance bond. So far as filing is concerned, Mississippi is like the Code in allowing notice filing and unlike it in requiring that the filing be local.

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[35]Miss. Code Ann. §§ 382-11 to 382-20 (1942).

[36]Miss. Code Ann. § 832-12 (1942). About three-fourths of the states having factors' lien laws, including New York, allow any borrower to give a lien on merchandise inventory. Six besides Mississippi restrict the transactions to wholesalers and four to manufacturers and processors.

[37]Miss. Code Ann. §§ 243-01 to 243-10 (1942). The prevailing American sentiment seems to favor some sort of public notoriety for assignments and this sentiment has been recognized in the filing rules of the Uniform Commercial Code. If filing does not have much use, at any rate, it does little harm. See Hanna, Extension of Public Recordation, 31 Col. L. Rev. 616 (1931).

The Mississippi exclusions conform to the Code where the customary transfer of the account would be by delivery and indorsement of paper. Whatever utility the Mississippi accounts receivable statute may prove to have, it seems, would be retained if Mississippi accepted the Code.

Article 9 of the Code in getting away from the legislative practice of enacting a series of special statutes dealing technically with different security devices, has nowhere shown more imagination than in its treatment of present and future intangibles as commercial security. The intangibles include a great deal more than the things called accounts receivable. More and more, intangibles are an important element of national economic life.[38] If these intangibles are valuable as property in a credit economy, they should be available as security. Participations in amusement and other enterprises, various sorts of licenses, long-term construction or supply contracts, are some of the illustrations of such intangibles. If security interests are allowed, their scope should be defined, their priorities established, such notoriety should be required as is appropriate and such enforcement machinery should be established as is fair to the parties involved. The trouble with such laws as the Mississippi Accounts Receivable statute is not that they are objectionable in themselves but that they are inadequate to meet legitimate demands for adapting security law to contemporary business needs.

V. CONCLUSION

Much recent Mississippi legislation in the field of security has been progressive. Notably in the case of the Uniform Trust Receipts Act, the new law has been a complex one whose passage reflects credit upon the intellectual quality and professional responsibility of the lawyers who proposed it and the legislators and governor who enacted it. Their success in such an enterprise might well lead to an earnest consideration of the Uniform Commercial Code as a whole. Its passage would improve Mississippi law without involving any changes that should adversely affect any legitimate interest. Such a result would also give Mississippi a pleasant position of regional leadership in progressive commercial legislation.

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[38]Contract Rights as Commercial Security: Present and Future Intangibles, 67 Yale L. J. 847 (1958).

AN APPRAISAL OF SUMMARY JUDGMENT PRACTICE UNDER RULE 56 FEDERAL RULES OF CIVIL PROCEDURE†

*L. Arnold Pyle**

As a result of the dissatisfaction in and out of the profession with the "law's delay," there was brought into being as a part of the Federal Rules of Civil Procedure, which rules became effective September 16, 1938, Summary Judgment Practice, Rule 56, as a vehicle to eliminate some of this delay.

From an examination of the more than 150 cases touching upon this subject which have been presented to the Court of Appeals of the Fifth Circuit since the commencement of the use of this practice, one will wonder whether or not there has really been any minimizing of delay, because out of this vast number of cases approximately one half have resulted in reversals. Statistics reveal that in the average case approximately one year elapses between the time of the entering of the summary judgment in the district court and its presentation to the court of appeals and return to the district court for further proceedings "not inconsistent with the opinion" rendered. It is readily apparent what this means in the way of eliminatng delay. A year has gone by and the litigants are normally at the same point they were in their litigation before the motion for summary judgment was submitted to the district court. In addition to delay, a motion for summary judgment improvidently made creates undue burdens upon the district court, the court of appeals, counsel and litigants.

It will be the purpose of this article to try to show some of the reasons why so many of the cases for summary judgment have been reversed. It is not difficult to understand why the overburdened trial court with its extremely heavy docket sometimes becomes over receptive to the temptation of counsel on these motions for summary judgment without taking an exhaustive look at the real purpose and function of the summary judgment rule. Lawyers often in their desire to avoid the mammoth task of putting on proof in a full dress trial lead themselves to believe that they have a good case for summary judgment when in truth and in fact they do not, that is, if they would look at the factual situation in the light of the purpose of the summary judgment rule. Other lawyers doubtless are making use of the summary judgment rule

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†An address given at the Judicial Conference of the Fifth Circuit at Houston, Texas on May 8, 1959.

as they did of the demurrer and dilatory pleas for the purpose of stalling for time and delay, generally in the hopes of getting a settlement.

In view of the trouble which both counsel and the courts seem to be having with the use of this important mechanism for the disposition of litigation, it will be helpful at this point to stop and take a close look at what is the real purpose and function of the summary judgment rule in the scheme of federal civil practice.

The summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact; it has been used in England for more than 50 years and had been adopted and was in use by a number of the states prior to the time it was made a part of the Federal Rules of Civil Procedure in 1938. It is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials when no genuine issue of fact is raised. The procedure enables the party to pierce the allegation of fact in the pleadings and obtain relief by showing that there are no genuine issues of material fact to be tried; its purpose is also to separate formal from substantial issues, eliminate improper issues, determine what, if any, issues of fact are present for the jury to determine, and enable the court to give judgment on the issues of law where no disputed issues of fact are found.[1]

Judge Charles Clark, a member of the advisory committee which drafted the Federal Rules of Civil Procedure, sets forth the function and purpose of the rule to be:

> "the summary judgment, as its name indicates, is a final judgment entered summarily by the court upon the showing that there is between the parties to a civil action no genuine issue of material facts requiring a formal trial of the action. Such showing is usually accomplished by affidavits of the moving party not adequately controverted by the opposing party. Through its use immediate adjudication is obtained of matters which ought not to be the subject of prolonged, time consuming, and expensive judicial proceedings."[2]

One thing we know for sure, it was not the intent of the advisory committee in recommending the summary judgment nor of the Congress in enacting this rule into law that it should do away with the right of trial by jury in this country.[3]

Judge Clark also says:

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[1]3 Barron and Holtzoff, Federal Practice and Procedure § 1231 (1958).

[2]Clark, Summary Judgments, 2 F.R.D. 364 (1942).

[3]See Bruce Construction Co. v. U.S., 242 F.2d 873 (5th Cir. 1957); Chappel v. Goltsman, 186 F.2d 215 (5th Cir. 1950); Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).

"So simple and natural is the procedure that it might well have been a usual and ordinary part of judicial administration had it not been for the development of trial by jury. As is well known, the use of the jury led to the substitution of written for oral pleadings, and eventually to the formalized issue making process of common law pleadings. When, therefore, any issue of fact was developed, it was reserved for the jury; and with the embedding of the jury trial right in our Constitution, the judges naturally hesitated to dispose of issues framed by denials, even though the latter might turn out to be false or sham."[4]

Summary judgment procedure is not a substitute for the trial of disputed issues of fact.[5] Chief Justice Hutcheson, speaking for the Fifth Circuit Court of Appeals, said early in the history of summary judgment practice:

"Summary judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of the trial; it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to set litigants off from their right of trial by jury if they really have evidence which they will offer on a trial; it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."[6]

This same language, in effect, was reaffirmed by the court in the case of *Slagle v. U. S.*,[7] and it has been quoted often by other courts and text writers on this subject.

Although the summary judgment rule has had to face repeated attacks on its constitutionality, it has survived these attacks and it has been settled that the court has undoubted power to strike a false or sham pleading even though the falsity is shown by matter outside the formal pleadings.[8]

The motion for a summary judgment strikes at the heart of the claim, counterclaim or cross-claim. In effect, it argues that as a matter of law upon admitted or established facts the moving party is entitled to prevail or the adversary has no valid claim for relief.[9]

In a large sense this procedure has been the victim of its own overwhelming popularity. The flood of cases applying the rule has been so great that often the rule itself has seemed lost amid the case law. And

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[4]Clark, supra note 2.
[5]3 Barron and Holtzoff, supra note 1.
[6]Whitaker v. Coleman, supra note 3.
[7]228 F.2d 673 (5th Cir. 1956).
[8]See Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, 19 N.E.2d 363 (1939); General Investment Co. v. Interborough R.T. Co., 237 N.Y. 133, 139 N.E. 216 (1923).
[9]See 3 Barron and Holtzoff, supra note 1.

too often, counsel, in their enthusiasm, have made utterly unjustified motions for summary judgment. Opinions denying such motions tend to create an inaccurate impression that the rule is not really usuable. The rule itself is unusually clear, both as to the procedural mechanics of the motion and as to the standard to be applied in passing on such motion. One undesirable consequence of the multitude of cases applying the rule is that too often in later cases courts have looked, not to the rule itself, but to colorful glosses upon it which have developed in the reported opinions, such as that it does not provide for "trial by affidavit" and that motions under the rule are to be denied whenever there is "the slightest doubt" as to the facts.[10]

Another undesirable consequence has been that opinions granting motions for summary judgment are routine and little noticed, while opinions denying such motions are likely to contain more quotable language, and to be widely regarded as controlling precedents. Many of the decisions denying motion for summary judgment are such a conglomeration of words discussing complicated and involved litigation (e.g. patent infringement cases) that it is difficult to decipher any meaning or draw any light from the particular decision as to just why the motion for summary judgment was denied. The court's opinion in *Inglett & Co. v. Everglades Fertilizer Co.*[11] deserves extended quotation as illustrative of this point. In this case the court said:

> "Our predicament and that of the judge below is not a new one for, 'were we skilled in the art it might be simple to determine whether there was any "genuine issue" as to any material fact with respect to . . . anticipation . . . but we lack that special knowledge which would permit us to read the patents so understandingly . . . .'
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> "As a matter of fact, it is at this point, we think, that the utter misconception of the function of summary judgment is most strikingly revealed. For almost as a concession that the technical meaning of these patent terms was a matter to be proved as a fact for determination by the judge as a fact is the retort in the defendant's brief: 'Why such expert testimony could not be put into the form of an affidavit in opposition to the motion for summary judgment remains a mystery.' But we have often said that summary judgment is no wager of affidavit, no compurgation by the most swearers or the most papers. Whereby the nature of things, the moving papers themselves demonstrate that there is inherent in the problem a factual controversy then, while it is certainly the part of prudence for the advocate to file one, a categorical counter-affidavit is not essential."

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[10]See 3 Barron and Holtzoff, supra note 1; Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 502-503 (1950).

[11]225 F.2d 342 (5th Cir. 1958).

The impression gathered from a careful reading of the *Inglett* case is that the real reasons the lower court was reversed were (1) because of the complicated issues involved and (2) because the attorney for one of the parties undertook to do the swearing himself.

It appears, however, from other decisions that the existence of an important, difficult or complicated question of law, where there is no genuine issue of material fact, is not a bar to a summary judgment.[12]

The scope of Rule 56 is the broadest possible, since the Rule provides that any party may move for a summary judgment in any type of civil action.[13] Rule 56 (c) provides that the court shall grant a motion for summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

It is clear from this provision that the movant in order to obtain a summary judgment must show (1) that there is no genuine issue as to any material fact in the case, and (2) that he is entitled to a judgment in his favor as a matter of law.[14]

Although there are numerous and sundry ways in which both counsel and the trial courts have fallen into error in attempting to make use of this important mechanism for the disposition of litigation, the greatest portion of the difficulty seems to rest upon the human frailties in trying to solve the above two questions. At first blush it might seem extremely easy to determine when there is no genuine issue as to any material fact in the case or that the moving party is entitled to a judgment in his favor as a matter of law; however, there have been volumes written on these two problems and insofar as the writer is able to determine there are yet no fixed rules or rule by which either of these two issues can be solved, hence, a continuing stream of divergent opinions from the courts and from text writers as to what constitutes a genuine issue of a material fact in a case and whether or not the same has been properly controverted by the methods provided under the provision of Rule 56 (c).

The second of these requirements has not caused nearly so much difficulty as the first because, here, generally, the courts have applied a test with which they are familiar, holding that the movant to obtain summary judgment must show that he would be entitled to a directed verdict at trial (if the case were tried before court and jury) on the basis of the undisputed facts. This matter will be discussed in more

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[12]See Dyal v. Union Bag-Camp Paper Corp., 263 F.2d 387 (5th Cir. 1959); Palmer v. Chamberlain, 191 F.2d 532 (5th Cir. 1951).

[13]Notes of the Advisory Committee on Rules for Civil Procedure, Rule 56 (1938).

[14]See Asbill and Snell, Summary Judgment Under the Federal Rules—When an Issue of Fact is Presented, 51 Mich. L. Rev. 1143 (1953).

detail subsequently. It is the first of these two requirements which has caused conflict and uncertainty.

Since whether there is a genuine issue as to a material fact truly must be determined on a case to case basis, only general principles can be gathered from the rule and the precedents. In each case, the judge must weigh the possible effect of a trial in open court to color, explain or contradict the evidence submitted to the court, in writing, on such a motion, used in the form of ex parte affidavits, against (1) the desirability of avoiding a long and expensive trial which might produce nothing more to assist the court in reaching a decision, and (2) the danger that the threat of such a trial will be used as a type of harrassment to coerce a settlement.[15]

When there are such important conflicting policy considerations, it is not strange to find different attitudes toward summary judgment, and conflicting statements and decisions by the courts. Thus, we find the summary judgment procedure praised because it "has demonstrated its worth as a prompt, business-like and inexpensive method of disposing of a substantial amount of litigation," and the statement that "there is no more effective method in the arsenal of legal administration." Judge Clark, reporter of the advisory committee which drafted the Federal Rules, has referred to the "very valuable remedy of summary judgment." On the other hand, trial judges were warned, by other judges of the same Court of Appeals for the Second Circuit of which Judge Clark is a member, that they "should exercise great care" in granting such motions, and that "time has often been lost by reversals of summary judgments improperly entered." We are told also that the procedure should be "cautiously invoked," and that "the power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification."[16] Moreover, it is often stated that on such a motion, all doubts as to the existence of a factual issue must be resolved against the movant, and that the court is critical of all papers of the movant, but not of those of the opposing party.

It is necessary to keep in mind these contrasting approaches to summary judgment in considering what constitutes a genuine issue as to a material fact, since it is apparent that the attitude of the individual judge to the procedure as a whole often colors his holding on this point. In considering the general question of when a movant shows that there is a genuine issue as to a material fact, there are two principal subsidiary questions: (1) what is a fact which may be disputed so as to prevent a summary judgment, and (2) how a party shows that a genuine issue as to such a fact exists.[17]

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[15]Id. at 1144.
[16]Asbill and Snell, supra note 14, at 1145.
[17]Asbill and Snell, supra note 14, at 1144.

Let us analyze these two questions briefly. What is a "fact" which may be disputed? One would think that there would be little trouble in determining whether there was a dispute as to a material fact; however, recent decisions of the Court of Appeals of the Fifth Circuit clearly demonstrate that this is not the case.[18] Here the court had before it the question as to whether summary judgment ought to have been granted against a general contractor and its surety in an action under the Miller Act,[19] for materials furnished to or for a subcontractor in the construction of a veterans hospital.

The court in the *Bruce* case was very explicit in its language in pointing out to the trial court and counsel that certain limited standards, at least, had been established in recent decisions of the court which should have enabled the trial court to recognize the fact that there was a genuine issue of fact, that is, a disputed fact to be tried in the case. Said the court:

> "We have long recognized that no matter how enticing, in an era of congested dockets, is a device to dispose of cases without delay and expense of additional trials with their sometimes cumbersome and time-consuming characteristics, summary judgment was not devised for, must not be used as, a substitute for trial. Its wholesome utility is, in advance of trial, to test, not as formerly on bare contentions found in the legal jargon of pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief or denial. Consequently, where the proceedings have indicated that a genuine issues exists, we have consistently rejected appealing shortcuts and not the less so even though it was likely that on a trial, the trial would resolve the disputed issues as one of fact in the same manner as when thought to have been one of law alone."[20]

Later in the case, the court continues:

> "But, equally vigorous in giving full reins to this mechanism, we have just as consistently rejected any notions that pretense, or apparent formal controversy can thwart application of the rule or hamstring the court in determining whether it is a proper case for it. Consequently, when a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by receivable facts that a real, not formal,

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[18]See, e.g., Bruce Construction Corp. v. U.S., 242 F.2d 873 (5th Cir. 1957).

[19]40 U.S.C. § 270(a)(d) (1952).

[20]Bruce Construction Corp. v. U.S., supra note 18. In support of this quotation see Gulf Power Co. v. Local Unions Nos. 676 and 1078, 229 F.2d 655 (5th Cir. 1956); Palmer v. Chamberlain, 191 F.2d 532 (5th Cir. 1951); Gray Tool Co. v. Humble Oil Refining Co., 186 F.2d 365 (5th Cir. 1950); Chappel v. Goltsman, 186 F.2d 215 (5th Cir. 1950); Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).

controversy exists, and, of course, he does not do that by mere denial or holding back evidence."[21]

In the case of *Bros., Inc. v. Grace Manufacturing Company*,[22] the court repeated the language used in the *Bruce* decision in reforming and affirming the judgment of the trial court.

It appears from the decisions, as well as the text writers, that it is not only the question of whether or not there is a genuine controversy of evidentiary fact that is causing the great trouble, but it is the question of the court's trying to determine whether there is a dispute as to the inferences of fact to be drawn from the evidentiary facts. When this is the case, it may be that neither party is entitled to a judgment as a matter of law. It seems settled by the decisions of the Court of Appeals, Fifth Circuit, that when there are conflicting inferences as to negligence or other evidentiary facts and the trier of facts has to draw the inferences, then summary judgment should not be granted, because neither party is entitled to judgment as a matter of law—neither party would be entitled to a directed verdict at trial.[23]

It has been held (by circuits other than the Fifth) that a dispute as to inferenes to be drawn is not a dispute of fact which prevents summary judgment.[24] This rule should apply regardless of whether the fact to be inferred from the undisputed evidentiary facts could be an evidentiary fact. Certain facts, such as negligence, must always be proved by proving other facts from which they are to be inferred. On the other hand, certain facts may be proved by direct or circumstantial evidence.

Is credibility as an issue of fact one which would prevent the application of summary judgment? This is a question which has arisen frequently when the moving party supports his motion by affidavit and/or deposition, and the credibility of the witnesses whose testimony is thus presented constitutes an issue of fact which prevents summary judgment. When the party opposing summary judgment intends to dispute facts by impeaching the witnesses of the movant, and so states, indicating the basis for such impeachment, there should be no doubt that there is an issue of fact which requires a trial.[25]

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[21]Bruce Construction Corp. v. U.S., supra note 18. Cited in support of this quotation are Chambers & Co. v. Equitable Life Assurance Society, 224 F.2d 338 (5th Cir. 1955); Surkin v. Charteris, 197 F.2d 77 (5th Cir. 1952); Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945); Engle v. Aetna Life Insurance Co., 139 F.2d 469 (5th Cir. 1943); Radio City Music Hall Corp. v. U.S., 135 F.2d 715 (5th Cir. 1943); American Insurance Co. v. Gentile Bros. Co., 109 F.2d 732 (5th Cir. 1940).

[22]261 F.2d 468 (5th Cir. 1958).

[23]See, e.g., Huff v. Louisville Nashville R.R., 198 F.2d 347, 349 (5th Cir. 1958).

[24]Read Magazine v. Hannegan, 158 F.2d 542 (D.C. Cir. 1946); Northland Greyhound Lines, Inc. v. Amalgamated Ass'n., 157 F.2d 329 (8th Cir. 1946); Otis & Co. v. Penn R. R., 155 F.2d 522 (3rd Cir. 1946).

[25]See Fireman's Mutual Ins. Co. v. Aponaug Manufacturing Co., 149 F.2d 359 (5th Cir. 1945).

Is the test for summary judgment the same as that to be applied on a motion for a directed verdict?

Remembering that the primary purpose of the motion for summary judgment is to avoid a useless trial, and that a motion may be made at an early stage of the litigation, then, in any event, such motion should be made and pressed within such time as not to delay the trial.[26] If there has been a mistrial, or the judgment has been reversed and remanded for a new trial, a motion for summary judgment that is not inconsistent with the mandate may be made within such time as not to delay the new trial. The defendant's motion for directed verdict may be made at the end of plaintiff's opening statement, at the end of plaintiff's case, and by either party or both parties at the close of the entire case. There is, then, a substantial time differential when these motions operate.[27]

But functionally the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for directed verdict. The crux of both theories is that there is no genuine issue of material fact to be determined by the trier of the facts, and that on the law applicable to the established facts the movant is entitled to judgment. As Mr. Justice Jackson stated in *Sartor v. Arkansas Natural Gas Co.*,[28] "A summary disposition . . . should be on evidence which the jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party." While the *Sartor* case involved an accident in which a jury had been demanded, the theory is equally applicable to a case tried by the court; it being clear that the court is not to determine controversial factual issues on a motion for summary judgment but only to determine whether there is any genuine material fact to be adjudicated.[29] Further, since credibility is normally a matter for the trier of the facts to pass on at a plenary trial, it is not the trial court's function to pass upon credibility in evaluating the evidentiary material in support of and in opposition to the motion for summary judgment, where the issue of credibility would properly be for the jury if the case where so tried.[30]

Following the directed verdict theory, a court should not grant summary judgment where it could not properly direct a verdict although it might properly set a verdict aside as against the weight of the evidence.[31]

When the judge denies a motion for summary judgment, Rule 56 (d)

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[26]See Woods v. Robb, 171 F.2d 539 (5th Cir. 1948).
[27]See 6 Moore, Federal Practice § 2020 (2d ed. 1953).
[28]321 U.S. 620 (1943).
[29]See Colby v. Klune, 178 F.2d 872 (2d Cir. 1949).
[30]See Sartor v. Arkansas Natural Gas Co., 321 U.S. 620 (1943); Firemans' Mutual Ins. Co. v. Aponaug Manufacturing Co., 149 F.2d 359, 362-363 (5th Cir. 1945).
[31]See ibid.

states that he "shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." This provision, too, has a counterpart in trial practice in that, although the judge denies a motion for directed verdict on the ground that some of the material factual issues are in dispute, where certain factual issues have been conclusively established he should properly instruct the jury to that effect.[32]

The delay and waste that result from improper handling by the district court of the motion for summary judgment bear a certain resemblance to the delay and waste that formerly resulted from the improper handling of the motion for directed verdict, although this matter has been largely remedied by Rule 50(b). Plenary trials before the trier of the facts, who can observe the demeanor of the witnesses as they testify on both direct and cross-examination, should be had where there is any *reasonable* doubt as to the facts. And it is a perversion of justice if tremendous time and energy must be spent by a party resisting a motion for summary judgment either to convince the district court that the motion should be denied, or, where the district court has granted a motion, in obtaining a reversal. Here the time and effort have been spent only for the purpose of getting a trial.

Where the defendant's motion for directed verdict is sustained at the end of plaintiff's case the judge has at least heard testimony at a live trial, but if the trial court improperly sustains the motion, reversal follows with its attendant delay and expense. Much the same, it applies where a verdict is actually directed at the close of the entire case. To remedy this evil, Rule 50(b) provides for an automatic reservation of decision on the motion for directed verdict made at the close of the entire case which permits a verdict to be taken and decision on the motion subsequently to be made.[33]

The directed verdict technique has, therefore, been molded so that a legal decision by the trial court can be obtained with a minimum of judicial waste. The summary judgment procedure on the other hand is productive of grave injustice or waste, or both, where judgment is improvidently granted. An improvident denial does not result in the delay and expense of an appeal, although, of course, it usually means the waste that attends a needless trial.[34]

In *Madeirene Do Brasil v. Stulman-Emrick Lumber Company*,[35] a contract action involving the sale of lumber where the crucial issue was market price, both seller and buyer moved for summary judgment. Buyer's right of recovery turned upon seller's letter as sole evidence of

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[32]See 6 Moore, Federal Practice § 2022 (2d ed. 1953).
[33]See ibid.
[34]See Doehler Metal Furniture Co. v. U.S., 149 F.2d 130 (2d Cir. 1945).
[35]147 F.2d 399 (2d Cir. 1945).

market price; seller did not attempt to explain the letter or offer any contradictory evidence, either on the original motion or on reargument. In affirming a summary judgment for the buyer, Judge Clark, for the majority, stated:

> "Here the analogy suggested in *Sartor v. Arkansas Natural Gas Corp.*, supra, of evidence which 'would require a directed verdict for the moving party' is useful. But care should be taken to make the analogy as exact as circumstances permit; the ruling is to be made on the record the parties have actually presented, not on one potentially possible. Hence, the case here is as though defendant had offered plaintiff's admissions, and plaintiff had then rested, with no contradiction or rebuttal of any kind, and had made its own motion for a directed verdict or a peremptory instruction."

Professor Moore says in his treatise,[36] that the party moving for summary judgment has the burden of establishing by a record that is adequate for decision of the legal question presented that there is no triable issue of material fact; and he has this burden even as to issues upon which the opposing party would have the trial burden. And the moving party's papers are carefully scrutinized, while the opposing party's papers, if any, are treated with considerable indulgence. If the moving party fails to shoulder his burden, his motion should be denied, even though the opposing party has presented no evidentiary material in opposition, and has not presented any 56 (f) affidavit. But the latter course of action on the part of the opposing party is extremely risky and is not recommended.

Although the trial court in the exercise of its sound discretion may decline to grant summary judgment, even though the movant has technically discharged his burden, the trial court will normally not look with indulgence upon the party who has presented neither evidentiary materials in opposition or any reason for his failure so to do.[37] Further, it is certainly well-settled that the opposing party is not entitled to hold back his evidence until trial;[38] and is not entitled to a trial on the possibility that an issue of material fact might arise if the case were to go to trial on the merits.[39] Nor as a general rule is an appellant entitled to overturn a summary judgment by raising an issue of fact not plainly disclosed in the trial court.

The trial court may not properly grant summary judgment on the belief that the opposing party will not prevail at trial; or, if he did, that

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[36] 6 Moore, Federal Practice § 2339 et seq. (2d ed. 1953).

[37] See Gray v. Amerada Petroleum Corp., 145 F.2d 730 (5th Cir. 1944); Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).

[38] See Surkin v. Charteris, 197 F.2d 77 (5th Cir. 1952); Port of Palm Beach District v. Goethals, 104 F.2d 706 (5th Cir. 1939).

[39] See Radio Music Hall Corp. v. U.S., 135 F.2d 715 (2d Cir. 1943).

a decision in his favor by the trier of the facts would be against the weight of the evidence. The motion for summary judgment can, however, be properly compared to the motion for a directed verdict. This is true because both motions proceed on the theory that there is no genuine issue of material fact to be resolved by the trier of facts, and that the movant is entitled to judgment on the established fact as a matter of law. As to certain issues the motion for summary judgment does, however, operate differently from the motion for directed verdict, since the party moving for summary judgment has the burden of establishing the lack of any triable issue of material fact even as to issues upon which the opposing party would have the burden of proof at trial.[40]

Although it clearly appears that the test for summary judgment is analogous to the test to be applied to a motion for a directed verdict, it cannot be accurately said that the tests are the same.

In examining the moving papers, and the opposing papers, if any, the trial court should give due weight to a number of factors: to the need for cross-examination by the opposing party in relation to any evidentiary materials, such as supporting affidavits, where the opposing party has had no opportunity to cross-examine; to general desirability of demeanor testimony; to the factor of access to proof by the opposing party; and, in a proper situation to the desirability that the case receive the full exploration of a trial. All reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment.

Again, it is not the function of the trial court at the summary judgment hearing to resolve any genuine factual issue, including credibility; and for purposes of ruling on the motion all factual inferences are to be taken against the moving party and in favor of the opposing party, and the appellate court will do likewise in reviewing the trial court's grant of summary judgment. Discretion plays no real role in the grant of summary judgment; the grant of summary judgment must be proper under the above principles or the grant is subject to a reversal. A trial court may, however, exercise its sound discretion in denying summary judgment, appropriate to the case at hand although the movant may have technically shouldered his burden.[41]

It is appropriate to treat briefly the mechanics of summary judgment procedure, e. g., the form of affidavits, and further testimony.

Rule 56 (e) provides "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified

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[40]See 6 Moore, Federal Practice § 2341 (2d ed. 1953).
[41]See id. at § 2342.

copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

This portion of Rule 56 means exactly what it says, that is, that the affiant shall have personal knowledge of the facts set forth in the affidavit, that such facts shall be admissible in evidence and the affidavit shall affirmatively show that the affiant is competent to testify to the matters stated therein. In spite of this simple language it appears that more often than not, affidavits filed in support of motions for summary judgment or in opposition thereto fail to meet these requirements. In some instances, the attorneys representing the parties have undertaken to do the swearing. Such undertaking is not looked upon with favor by the courts.[42] Such affidavits not only fail to meet the requirements of the Rule but also place the court in a very difficult position of having to pass upon the veracity of members of the Bar and this is not a pleasant task. It is wholely unnecessary. It is common knowledge that the canon of ethics prohibits or at least discourages counsel from testifying either by way of affidavit or in open court to matters other than those which are routine or of a formal nature. This, of course, applies to the situation where the lawyer making the affidavit is the same lawyer who is representing the party for whom he is swearing.

However, in the case of *Bros., Inc. v. Grace Manufacturing Company*,[43] mentioned earlier, the court permitted affidavits of counsel and made no mention of this breach of the procedural rule in its opinion, even though the appellant in that case attacked the use of affidavits under the decision in the *Inglett* case.[44] It is apparent why the court failed to heed the argument of appellant's counsel here because the attorney making the affidavit in this case was verifying purely formal matters concerning other litigation involved.

Your writer's experience on the bench has made him allergic to an attorney's swearing to any kind of a document for a client, including the verifying of pleadings. Many embarassing situations may arise, needlessly, because lawyers made oath to matters when their client should have been doing the swearing, and when it came to a showdown the matters set forth in the document were at variance with the knowledge and understanding of the client. It is sufficient for our purposes here to say that generally affidavits by counsel as to factual information upon which he relies for support of his motion for summary judgment or in opposition thereto will not meet the requirements of Rule 56 (e) and

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[42]See, e.g., Inglett v. Everglades Fertilizer Co., 255 F.2d 342 (5th Cir. 1958); Mercantile National Bank v. Franklin Life Ins. Co., 248 F.2d 57 (5th Cir. 1957).

[43]261 F.2d 428 (5th Cir. 1958).

[44]Inglett v. Everglades Fertilizer Co., supra note 42.

will often be in bad taste under the canon of ethics of the legal profession.

It is entirely clear that the use of evidentiary affidavits on the part of either the moving or the opposing party is permissive, and, if affidavits are used, the extent to which one or both of the parties relies upon them is a matter of choice by the party. Since the affiant has not been subject to cross-examination and his demeanor is not observable, sound judgment may suggest that in a particular situation another method or methods of proof, such as depositions, admissions, and answers to interrogatories should be largely relied upon or that proof of this nature be used to supplement proof by affidavits. The sanction of this combination of methods of proof is found in the language of the rule itself: "The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

Rule 56 (e) deals with evidentiary affidavits and when such affidavits meet the requirement of the Rule they may be used to successfully pierce pleading allegations.[45]

It should be pointed out again that affidavits are not the only types of evidence which may be presented on a motion for a summary judgment or in opposition thereto. Rule 56 (c) provides that the hearing upon the motion shall be upon "the pleadings, depositions, and admissions on file, together with the affidavits, if any," and the courts have enlarged the language of the rule by holding that litigants may use interrogatories and answers thereto, oral testimony and stipulations, concessions of counsel, certified transcript of a court or administrative record of proceeding, exhibits and other papers that have been identified by affidavit or otherwise made admissible in evidence.

It is interesting to note that in *Town of River Junction v. Maryland Casualty Co.*,[46] the court said that interrogatories and answers under Rule 33 "are not depositions referred to in Rule 56 as to be considered on summary judgment." The court in this case adhered to the time-honored concept that it is a court's function to follow the literal language of the statute or rule being construed. However, in the subsequent case of *Kohler v. Jacobs*,[47] the court, with the same judge writing the opinion, went along with courts of other circuits and said that interrogatories and answers thereto under Rule 33 do constitute evidence, if otherwise admissible, on a motion for or against summary judgment. The Rule itself makes no mention of the use of oral testimony nor many of the other things which are currently being used as evidence in support of or against the motion for summary judgment. This is but a small item but it points out why lawyers and trial judges remain

[45]See 6 Moore, Federal Practice § 2325 (2d ed. 1953)
[46]110 F.2d 278, 283 (5th Cir. 1940).
[47]138 F.2d 440 (5th Cir. 1943).

constantly at sea when trying to prepare, present, and decide litigation. For instance, a lawyer can examine a statute or a rule such as Rule 56 with the most careful eye and consideration and proceed to do that which the language of the statute or rule tells anyone of ordinary intelligence should be done, but when he gets to the appellate court he finds that the legislature or Congress or the rule making body did not know what it intended to say, and that only the judges sitting on the court of last resort are smart enough to know and to say what the legislature or the Congress should have said in the first place. A reading of the cases leaves little doubt that a great deal of difficulty here is due to a continuous enlargement upon the intent and purpose of the use of the summary judgment practice by the appellate courts. The result is that while the original purpose and intent of Rule 56 was to provide a simple shortcut to the elimination of needless litigation, the courts over the years have enlarged upon it and its provisions to the extent that it is often more complicated and involved to proceed under the rule than it would be to undertake a trial on the merits.

This altered approach is at war with what appears to be the original purpose of the Rule not to take away from any litigant his right to a trial of his claim, counterclaim or other action if they were possessed of any show of merit. In the early days of the practice under Rule 56 the Fifth Circuit Court, in the case of *American Insurance Company v. Gentile Bros. Co.*,[48] said:

> "Rule 56, 28 U.S.C. following section 723 (c) clearly provides that a summary judgment should only be awarded when the pleadings, depositions, admissions, and affidavits, if any, disclose that except as to the amount of damages there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Under this rule a summary judgment should only be given when it is clear what the truth is."

Barron and Holtzoff in their treatise on Federal Practice and Procedure,[49] cite the *American Insurance Co.* case along with many other decisions under this statement: "A movant is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances."

In the early case of *Arnstein v. Porter*,[50] the court of the Second Circuit reversed a decision of the district court sustaining a motion for summary judgment holding that there was an issue of fact because there was evidence of sufficient access on the part of defendant to plain-

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[48] 109 F.2d 732 (5th Cir. 1940).
[49] Barron and Holtzoff, Federal Practice and Procedure § 1234 (1958).
[50] 154 F.2d 464 (2d Cir. 1946).

tiff's compositions for a jury to infer copying of certain songs. The opinion, in part, of the court is as follows:

> "If, after hearing both parties testify, the jury believes defendant's denials it can, from such facts, reasonably infer access. It follows, that as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the 'crucial test of credibility'—in the presence of the jury. Plaintiff, or a lawyer on his behalf, on such examination may elicit damaging admissions from defendant; more important, plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief."

Again the case of *Colby v. Klune,*[51] the court of the Second Circuit stated its cautious attitude toward the use of summary judgment in this fashion:

> "For the affidavits do not supply all the needed proof. The statements in defendants' affidavit certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor."

In reversing a summary judgment for a defendant on the ground that plaintiff had misused the patent which was the basis of plaintiff's claim, the Chief Judge of the Fifth Circuit Court, in *Gray Tool Co. v. Humble Oil Refining Co.,*[52] adopted plaintiff's contentions thusly:

> "That this is another of those all too numerous instances of the misuse of the summary judgment procedure to cut a trial short; that here, as so often before, it has served only to prove that short-cutting of trials is not an end in itself but a means to an end, and that in the conduct of trials, as in other endeavors, it quite often is true that the longest way around is the shortest way through."

Another good instance of this attitude is what Judge Holmes had to say in the case of *Palmer v. Chamberlain;*[53] in dissenting from an affirmance of the summary judgment he stated:

> "Here we have an instance of the summary judgment procedure

[51] 178 F.2d 872 (2nd Cir. 1949).
[52] 186 F.2d 365 (5th Cir. 1951).
[53] 191 F.2d 532 (5th Cir. 1951).

being as arduous as a trial on the merits. The pertinent provisions of the by-law or so-called agreement cover less than a printed page; but the record contains four hundred and seven printed pages, not to mention the briefs. Notwithstanding the complaint, exhibits, answer, request for admission of facts, reply thereto, depositions, affidavits, stipulation following pretrial conference, and motion for summary judgment, with exhibits, we remain in doubt as to which of the appellees are the real parties plaintiff."

Since the 1946 amendments to the Federal Rules of Civil Procedure it is quite clear that a motion for a judgment on the pleadings under Rule 12 (b) may be treated as a motion for summary judgment. The following sentence was added to Rule 12 (b) by the 1946 amendment:

"If, on a motion asserting the defense numbered (6) to dismiss for a failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

A number of recent decisions of the Court of Appeals for the Fifth Circuit clearly indicate that it is, at the least, a very hazardous and risky procedure to undertake to substitute a motion for summary judgment for judgment on the pleadings, for instance, in the case of *Demandre v. Liberty Mutual Ins. Co.*,[54] the court said:

"Our difficulty is not so much with the interpretation of this policy exclusion. Necessarily it uses broad and general terms. But none pose problems exceeding the usual task of judicial interpretation. Our difficulty stems from the procedural manner in which the issue was attempted to be resolved below. Except for bringing into the case the exclusionary endorsement of the policy . . . the insurer's motion for summary judgment was really nothing but a motion for judgment on the pleadings. It is true that FRCP 56 (and Rule 12 (3)) permits this, but the course is tortuous and frequently leads to reversal because it undertakes to determine legal questions on the basis of facts as they are broadly asserted to be rather than what they are or may be found to be.[55] Any such process is exposed to the perils of an outright motion under FRCP 12 (b) that the complaint fails to set forth facts entitling the party to relief.

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[54] 264 F.2d 70 (5th Cir. 1958).

[55] See, e.g., Dyal v. Union Bag-Camp Paper Corp., 263 F.2d 387 (5th Cir. 1958); Hiern v. St. Paul-Mercury Indemnity Co., 262 F.2d 526 (5th Cir. 1958).

We have many times pointed out the pitfalls in the maneuver . . . .[56] The pitfalls arise because of the nature of the underlying tests which we have many times stated and which have been recently restated in the broadest terms. 'In appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . . .'[57] Consequently whether the 'facts' stated in the complaint present a 'genuine issue as to any material fact' as FRCP 56 requires is really to be measured by whether no evidence could be offered to support the plaintiff's theory. By the very nature of this complaint, stated as it is in the broad language permitted by the rules, far from showing the absence of controversy, it reflects on its face that many questions of fact are open and still undisclosed."

It should be pointed out that, although counter-affidavits to affidavits and other evidence offered in support of the motion for summary judgment are not required, it is extremely hazardous for a litigant not to offer counter-affidavits if he is in a position so to do. The court frowns upon a party sitting upon his evidence and failing to disclose it.[58] We are all familiar with the fact that nothing is supposed to be hidden any more insofar as proof is concerned in actions pending in the federal courts. In the case of *Bros., Inc. v. Grace Manufacturing Co.*,[59] although counter-affidavits were offered, the court held that they were insufficient to counter the affidavits, the pleadings and other evidence submitted by the movant for a summary judgment, and consequently the motion for summary judgment was sustained as to most of the issues. In the case of *Bruce Construction Corp. v. United States*,[60] the court likewise held the counter-affidavit to be nothing but a mere denial, and insufficient to show that a material issue of fact existed and consequently, the order granting motion for summary judgment was affirmed.

It is also important to note that there are those cases in which it is not necessary that the respondent file any affidavits or other pleadings in opposition to the motion for summary judgment, because due to the very nature of the case it is apparent on the face of the pleadings that there are controverted facts which must be determined by a trier of facts, as in the cases of *Inglett & Company v. Everglades Fertilizer Co.*,[61]

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[56]See, e.g., Carss v. Outboard Marine Corp., 252 F.2d 690 (5th Cir. 1958); Millet v. Godchaux Sugar, Inc., 241 F.2d 264 (5th Cir. 1957).

[57]Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[58]Chambers & Co. v. Equitable Life Assurance Society, 224 F.2d 338 (5th Cir. 1955).

[59]261 F.2d 428 (5th Cir. 1958).

[60]242 F.2d 873 (5th Cir. 1957).

[61]255 F.2d 342 (5th Cir. 1958).

Heyward v. Public Housing Administration; and *Gulf Power Co. v. Local Unions Nos.* 676 & 1078,[63] so one cannot feel that he is home free if he makes a motion for a summary judgment and the opposition fails to file any counter-affidavits or offer any other evidence in defense.

Another interesting thing about summary judgment practice is the fact that if the opposing party also moves for summary judgment, it is held that it does not necessarily follow that summary judgment should be granted, since there may still be issues of fact. This ruling seems clearly to be correct for the reason stated in the case of *Walling v. Richmond Screw Anchor Co.*:[64]

> "It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show, that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists."

This decision was approved by the Fifth Circuit in the case of *Chambers & Co. v. Equitable Life Assurance Society.*[65]

To be sure, there are those cases which lend themselves beautifully to disposition by way of summary judgment. Such was the recent case of *Bruce v. The Travelers Ins. Co.*[66] The facts in this case were briefly that Jack Bruce, plaintiff-appellant, was employed as a roughneck by the Gulf Drilling and Well Service. Bruce's employer was engaged in reworking an oil well for Gulf Refining Company (Gulf), a company unrelated to Bruce's employer, when Bruce was injured as a result of negligence on the part of a Gulf employee, H. J. Collins.

Travelers Insurance Company carried a public liability insurance policy on Gulf that also provided extended coverage for "any executive officer, director or stockholder . . . while acting within the scope of his duties." Bruce brought suit for personal injuries against Travelers, under the Louisiana Direct Action Statute, as an insurer of Collins. The theory of the complaint was that Collins was an "executive officer" of Gulf, since he was "invested with the general conduct and control of the business of Gulf Refining Company" at the well location.

Travelers filed a motion for a summary judgment, and introduced affidavits, depositions and Gulf's charter and by-laws to show that Collins was not an executive officer of Gulf. The plaintiff offered no counter-affidavits or depositions, taking the position that he was en-

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[62] 238 F.2d 689 (5th Cir. 1956).
[63] 229 F.2d 655 (5th Cir. 1956).
[64] 156 F.2d 780 (2d Cir. 1946).
[65] 224 F.2d 338 (5th Cir. 1955).
[66] 266 F.2d 781 (5th Cir. 1959).

titled to have the jury determine whether Collins was an executive officer.

The main issues before the court on appeal were (1) what is an "executive officer," as that term is used in a public liability insurance policy covering a large oil company and its executive officers, and (2) is the question a matter for the court to decide on a motion for summary judgment or for a jury to decide after a trial?

The court was able to look at the evidence before it in the form of the affidavits, depositions, and the charter of Gulf together with its by-laws and finally determine that as a matter of law Collins was not an executive officer within the terms used in the public liability insurance policy and consequently it affirmed the action of the lower court granting the motion for summary judgment.

In its opinon the court quoted at some length from Professor Moore's statement on the broad considerations behind Rule 56 to the following effect:

> "In its broadest scope the summary judgment procedure is in the nature of a pre-trial inquiry brought on by motion of either a claimant or a defending party for a favorable determination that a trial is unnecessary because there is no genuine issue as to any material fact .... Some actions and issues may, as a general rule, be more amenable to a summary adjudication than others, such as actions on written contracts .... It cannot be stressed too strongly that there is no civil action or issue that is immune to summary adjudication; and when general principles have warranted summary judgment has been rendered in all types of civil actions and on all kinds of issues."[67]

From an examination of the cases and articles by the text writers, it is believed that it can be said with safety that the motion for summary judgment has been successfully used in all types of civil actions and on all kinds of issues.

Many of the important factors of summary judgment have not been touched, but this is a tremendous subject upon which many thousands of words have been written by judges and text wirters. Space simply will not permit a full discussion of all the factors and the decisions of the courts dealing with them. It is hoped, however, that enough has been said to arouse our curiosity and cause us to take another look at summary judgment practice in its true light before thinking unpleasant thoughts of anyone because of past treatment of this important tool in the administration of justice.

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[67] 6 Moore, Federal Practice § 2161-3 (2d ed. 1953).

It should be remembered as was so aptly put by Professor Moore in his treatise[68] that:

> "The summary judgment procedure is not a 'catch penny contrivance' operating to deprive a litigant of, nor is it a substitute for, a live trial when there is any genuine issue of material fact to be tried. Nor is it a panacea for overcrowded dockets, except to the extent that it properly eliminates the trial of phantom issues, and of claims and defenses without merit or which involve only the application of substantive legal principles to clearly established facts. When wisely used by the trial courts the summary judgment procedure is an extremely valuable and liberal measure in securing a just and expeditious adjudication."

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[68]Id. at § 2166.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXI MARCH 1960 NUMBER 2

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RECENT DECISIONS

Constitutional Law—Bible Reading in Public Schools

This action was brought by the parents individually and as the guardians of their children against the Abington Township School District and others to enjoin the enforcement of a Pennsylvania statute providing for the reading of ten verses of the Holy Bible by the teachers and students, without comment, at the opening of each school day. Held: Such reading constituted a religious ceremony and the statute violated the proscription of the First Amendment to the federal constitution as applied to the states by the Fourteenth Amendment. *Schemp v. School District of Abington Township, Pennsylvania,* 177 F. Supp. 398 (E.D. Pa. 1959).

The constitutionality of Bible reading without comment in public schools is not well established. Although the state courts have accepted the rule that acts which result in the establishment of a particular religious sect are generally in violation of state constitutional provisions prohibiting sectarian teaching or giving preference to any religious sect, they are not in agreement as to whether reading of the Bible is such a violation. This disagreement results from different views on the definition of a religious sect. The majority of the states have held that a "sect" is a body of persons distinguished by peculiarities of faith from other bodies adhering to the same general system. According to this interpretation, Bible reading without comment teaches fundamental morality, but does not advocate a particular sect to the prejudice of other sects. Consequently most courts uphold Bible reading,[1] while some admit it may be sectarian,[2] and others limit it to reading from the Old Testament.[3] On the other hand, a few courts have defined a "sect" in broader terms and found the activities of one faith sectarian as to the activities of another faith. These courts interpret mere Bible reading as favoring one sect, and thereby contravening constitutional guarantees.[4] The United States Supreme Court has not decided the constitutionality of Bible reading in public schools. However, it has held that the Fourteenth Amendment protects citizens from state interference with freedom of religion as set forth in the First Amendment—"Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof."[5]

The foregoing is a summary of the decisions concerning Bible read-

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[1]People ex. rel. Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); Lewis v. Bd. of Educ., 1157 Misc. 520, 286 N.Y.S. 174, 12 N.E.2d 172 (1935); Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

[2]State ex. rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846, 93 N.W. 169 (1902).

[3]Kaplan v. Brooksville Graded School Dist., 171 Minn. 142, 214 N.W. 18 (1927); Doremus v. Bd. of Educ., 5 N.J. 435, 75 A.2d 880, *appeal dismissed* 342 U.S. 429 (1950).

[4]People ex. rel. Ring v. Bd. of Educ., 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Bd., 136 La. 1034, 68 So. 116 (1915); State ex. rel Weiss v. Dist. Bd., 76 Wis. 177, 44 N.W. 967 (1890).

[5]Everson v. Bd. of Educ., 330 U.S. 1 (1947); Murdock v. Pa., 319 U.S. 105 (1943); Cantwell v. Conn., 310 U.S. 296 (1940).

ing, and they all turn on the question of whether a particular sect has been favored. Since these decisions, the United States Supreme Court decided in *Everson v. Bd. of Educ.*[6] that "Neither a state nor a federal government can pass laws which aid one religion, aid *all* religions, or prefer one religion over another." In *Ill. ex. rel. McCollum v. Bd. of Educ. of Champaign County*,[7] the court also rejected the idea that all religions were given equal protection under the First Amendment. However, a later "released time" program identical in every respect to the *McCollum* case, except that the classes were held outside of the school building, was held constitutional.[8] This case, *Zorach v. Clauson*,[9] is generally considered a partial retreat from the *McCollum* case, and contains the relevant statement that, "We cannot read into the Bill of Rights such a philosophy of hostility to religion." In short, the *Everson* and *McCollum* cases build a wall separating church and state, while this later case recognizes a separation, but one that is not complete in all respects. Just where does that leave Bible reading in public schools? Since acts which aid all religions as well as acts which would favor one religion violate the First Amendment, it would seem logical that no state statute requiring Bible reading in public schools would be constitutional. However, the Tennessee Supreme Court upheld such a statute, recognizing the *Everson* and *McCollum* decisions, but holding that in light of the customs and practices the statute did not contemplate the establishment of religion.[10] The principal case is the only other decision concerning Bible reading in public schools since the principle of complete separation of church and state was set forth in the *Everson* and *McCollum* cases. This case followed and quoted the *McCollum* case, "The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." The question involved in these cases now is not whether a particular sect has been favored, but whether the acts of states are religious acts. It is submitted that, in legal logic, the decision in the noted case is the better approach, and the Tennessee decision[11] upholding a statute requiring Bible reading is somewhat strained. It is further submitted that future cases concerning the constitutionality of Bible reading in public schools will be decided much the same as the *Schemp* case and hence bear little resemblance to the existing decisions on Bible reading in public schools.

Walker L. Watters

CONSTITUTIONAL LAW—EFFECT OF FOURTH AMENDMENT UPON EVIDENCE OBTAINED BY ILLEGAL SEARCHES AND SEIZURES

Defendant was arrested in the bathroom of his uncle's premises by city officials, who searched and took from him a small package containing

[6]331 U.S. 1 (1947).
[7]333 U.S. 203 (1948).
[8]Zorach v. Clauson, 343 U.S. 306 (1952).
[9]Zorach v. Clauson, supra note 8.
[10]Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).
[11]Ibid.

heroin. Both the arrest and search were made without a warrant. State charges were preferred against defendant and, after a hearing in a state court, defendant's motion to suppress the evidence was allowed, on the ground that the arrest as well as the search and seizure were illegal. The evidence was turned over to federal officers for use in federal court. The District Court denied a motion to suppress the illegally obtained evidence and judgment was had against the defendant. HELD: Affirmed. Relying upon the rule announced in *Weeks v. United States*,[1] which the United States Supreme Court has so consistently embraced, the District Court found that the Fourth Amendment did not preclude the use in federal courts of evidence illegally obtained by state officers acting on their own. *United States v. Camara*, 271 F.2d 787 (7th Cir. 1959).

A general survey of the question concerning admissibility of illegally obtained evidence discloses five situations in which a prohibition against the admissibility of such evidence could be recognized. These situations may be characterized in the following manner: (1) Refusal of federal courts to use evidence illegally obtained by federal officers; (2) Refusal of federal courts to use evidence illegally obtained by state officers; (3) Refusal of state courts to use evidence illegally obtained by state officers; (4) Refusal of state courts to use evidence illegally obtained by federal officers; (5) Refusal of state courts to use evidence illegally obtained by officers of sister states. The first situation arose and was ruled upon favorably to the defendant in the *Weeks* case which has been held controlling in such situations since.[2] The second situation, into which the note case falls, likewise arose in the *Weeks* decision and was settled in a contrary manner. The recent emergence of this question as an open one is the basis of this note and will be discussed in the next paragraph. The last three situations result from the 1949 holding in *Wolf v. Colorado*,[3] where the Fourth Amendment[4] prohibition against illegal searches and seizures was held applicable to the states as an element of due process required by the Fourteenth Amendment.[5] The diversity of treatment in such situations, however, is readily apparent from the following review. The third situation has been ruled upon and apparently settled by *Wolf v. Colorado*[6] and *Stefanelli v. Minard*[7] which recognized the Fourteenth Amendment's incorporation of the Fourth Amendment's prohibition, but refused to bar a state's use of such evidence due to the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law,"[8] leaving the enforcement of the prohibition to the states through

[1]232 U.S. 383 (1914).

[2]Feldman v. U.S., 322 U.S. 487 (1944); Byars v. U.S., 273 U.S. 28 (1927); Agnello v. U.S., 269 U.S. 20 (1925); Gould v. U.S., 255 U.S. 298 (1921); Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920).

[3]338 U.S. 25 (1949).

[4]U.S. Const. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[5]U.S. Const. amend. XIV, §1. "... nor shall any State deprive any person of life, liberty, or property, without due process of law ...."

[6]See note 2 supra.

[7]342 U.S. 117 (1951).

[8]Stefanelli v. Minard, *supra* note 7, at 120.

other sanctions if the states so desired. The fourth situation has resulted in an area of controversy where those states following the *Weeks* theory have split on the use of such evidence, while those opposed to the *Weeks* theory allow the use of such evidence.[9] The fifth situation, in which the state courts following the exclusionary rule of *Weeks* are divided on admitting the evidence,[10] has been treated by the United States Supreme Court as one open to the Court on the factual situation at hand.[11] Those states which do not follow the exclusionary rule admit the evidence as a matter of course in reliance upon the common law practice.

The second situation, disposed of in the *Weeks* case by allowing the use of such illegally obtained evidence, had been considered settled by that case until 1958, when in *Hanna v. United States*[12] a reconsideration of the situation resulted in a contrary holding by the D. C. Circuit Court of Appeals on the basis that the question was an open one before the United States Supreme Court. This conclusion was reached by noting the destruction of the *Weeks* rationale by *Wolf*, coupled with the individual opinions of the majority of the members of the Supreme Court in a review of Supreme Court history of the question since the *Wolf case*.[13] It was reasoned that the *Wolf* holding—that the Fourth Amendment guaranty was so basic an element of due process that it was incorporated into the Fourteenth Amendment—overruled the very constitutional pronouncement upon which the *Weeks* decision had predicated the admissibility of state-seized evidence in a federal trial. Despite the impressive argument thus advanced in the *Hanna* case, the court in the instant case has relied on stare decisis in applying the *Weeks* rule.

If the opinion contained no more than a reference to and refusal to follow the *Hanna* holding, the noted case would be of little signifi-

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[9]Some Weeks states say it would be wrong for them to sanction federal wrongdoing. State v. Arregni, 254 Pac. 788 (Idaho 1297); Walters v. Commonwealth, 199 Ky. 182, 200 S.W. 839 (1923); Little v. State, 171 Miss. 819, 159 So. 103 (1935); State v. Rebasti, 306 Mo. 336, 267 S.W. 858 (1924); State v. Hiteshew, 42 Wyo. 147, 292 Pac. 2 (1930). Other Weeks states, noting the federal rule that evidence illegally obtained by state officers is inadmissible, say that by the same reasoning a state court should not question federally obtained evidence. State ex rel. Kuhr v. District Court, 82 Mont. 515, 268 Pac. 501 (1928); Johnson v. State, 155 Tenn. 628, 299 S.W. 800 (1927). In states which reject the Weeks rule, federally obtained evidence has been admitted. Terrano v. State, 59 Nev. 247, 91 P. 2d 67 (1939); State v. Lacy, 212 N.W. 442 (N.D. 1927).

[10]People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935); Young v. Commonwealth, 313 S.W.2d 75 (Ky. 1958); Kaufman v. State, 189 Tenn. 315, 225 S.W.2d 75 (1949).

[11]Gallegos v. Nebraska, 342 U.S. 55 (1951).

[12]260 F.2d 723 (D.C. Cir. 1958).

[13]Mr. Chief Justice Warren in Benanti v. U.S., 355 U.S. 96, 102 n. 10 (1957), says: "It has remained an open question in this court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment." Mr. Justice Frankfurter in Lustig v. U.S., 338 U.S. 74, 79 (1949), says: "where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by state officers." Mr. Justice Douglas in Irvine v. California, 347 U.S. 128, 149 (1954), says: "we should be alert to see that no *unconstitutional* evidence is used to convict any person in America." Mr. Justice Clark in Breithaupt v. Abram, 352 U.S. 432, 434 (1957), says: "evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions." Mr. Justice Harlan speaks of a "constitutional command" to preclude such evidence in his dissenting opinion in Rea v. U.S., 350 U.S. 214, 218 (1956). Only Mr. Justice Burton, at the time of the Hanna case, seemed committed to a continuing recognition of the Weeks distinction, and he has since retired.

cance. But the court goes much further, saying in effect that their holding is the unreasoned result of stare decisis rather than the reasoned and reasonable approach used in *Hanna*.[14] Such frank self-criticism of the use of stare decisis in this situation, coupled with the impressive argument advanced in *Hanna*, may well influence the Supreme Court to overrule that portion of the *Weeks* holding at issue when the question again reaches the Supreme Court. Such action would certainly seem necessary if the intent expressed in the Fourth Amendment is to be effectuated.[15]

E. Roy Hunt

CONSTITUTIONAL LAW—POWER OF STATE LEGISLATURE TO EXCLUDE NEGROES FROM MUNICIPAL CORPORATIONS

The Alabama Legislature passed "An Act to alter, rearrange, and redefine the boundaries of the City of Tuskegee in Macon County."[1] The effect of the act was to exclude from the city, as redefined, all but four or five of the four hundred negroes who were qualified to vote in the municipal elections. None of the six hundred white electors were excluded from the new municipal limits. The plaintiffs, negroes who had been excluded from the city as a result of the redistricting, brought a class action in the United States District Court against the mayor and city and county officials to enjoin them from enforcing and executing the act, and to obtain a declaratory judgment rendering the act invalid as contrary to the Fourteenth and Fifteenth Amendments. The District Court upheld the act,[2] and the plaintiffs appealed to the United States Court of Appeals. HELD: Affirmed. Establishing the boundaries of municipal corporations is an act of sovereignty performed under a power reserved by the Tenth Amendment, and in the absence of any racial discrimination appearing on the face of the statute, the courts will not hold an act diminishing the area of a municipality invalid as violative of the Fourteenth and Fifteenth Amendments even though, as an incidence of it, negroes are purposely deprived of the right to vote in city elections. *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959).

It is elementary that a municipal corporation is but a creature of the state; a political sub-division which exists by virtue of the power of the state exercised through its legislative department.[3] Municipalities

[14]"We are not prophets but even if we were we think it would be rather hazardous to predict what the Supreme Court may do when and if the question involved is again presented to it. Casting aside any personal view which we may entertain as to what the rule should be, we think it a more judicious approach to follow the rule which the Supreme Court has so often and consistently embraced. Perhaps the contrary decision in Hanna will be the means of persuading the Supreme Court that it should again examine and decide the question. If so, the Hanna case will have served a good purpose."

[15]Since this note was written two similar cases have been decided in a similar manner, the courts likewise citing Hanna. U.S. v. Evans, 28 U.S.L. Week 2363 (U.S. D.C. Md. 1960); Kendall v. U.S., 272 F.2d 163 (5th Cir. 1959).

[1]Ala. Acts 1957, at 185.

[2]Gomillion v. Lightfoot, 167 F. Supp. 405 (M.D. Ala. 1958).

[3]Joslin Co. v. Providence, 262 U.S. 668 (1922); Trenton v. New Jersey, 262 U.S. 182 (1922); Worcester v. Street Railway Co., 196 U.S. 539 (1904); Atkin v. Kansas, 191

have no inherent right of self-government which is beyond legislative control.[4] What portion of a state shall be within the limits of a city has always been considered to be a proper subject of legislation,[5] and a matter peculiarly within the domain of state control.[6] It is within the power and discretion of the legislature not only to establish the original limits of a municipal corporation, but also to enlarge, diminish, or altogether abolish them at any time.[7] Such power may be exercised without the consent of, and even against the remonstrance of, every voter within the limits of the original municipality.[8] The power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities.[9] If the legislative action operates injuriously to the municipality or to individuals, the remedy is not with the courts but through the ballot box.[10] The rights, powers, territory, and public property of a municipal corporation can never become such vested rights as against the state that they cannot be taken away.[11] A municipal corporation cannot invoke against its creator the Contract Clause,[12] the Due Process Clause,[13] the Equal Protection Clause,[14] or the Privileges and Immunities Clause[15] of the United States Constitution.[16] Nevertheless, the Court has frequently intervened where the constitutional rights of *individuals* have been infringed by the legislature in the exercise of its power over municipal corporations. Creditors of a municipality are protected by the Con-

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U.S. 207 (1903); Barnes v. District of Columbia, 91 U.S. 541 (1875); U.S. v. Railroad Co., 17 Wall. 322 (1872); Railroad Co. v County of Otoe, 16 Wall. 667 (1872); East Hartford v. Hartford Bridge Co., 10 How. 511 (1850); 1 Antieau, Municipal Corporation Law § 2.00 (1958); 1 Dillon, Municipal Corporations § 37 (5th ed. 1911).

[4]Cranford Co. v. City of New York 38 F.2d 52 (2nd Cir. 1930) *cert. denied*, 281 U.S. 760 (1930); Trenton v. New Jersey, supra note 3; Metropolitan RR. Co. v. District of Columbia, 132 U.S. 1 (1889); 1 McQuillin, Municipal Corporations § 186 (2nd ed. 1940); 1 Cooley, Constitutional Limitations 391 (8th ed. 1927); Dillon, op. cit. supra note 3, § 98.

[5]U.S. v. Steuart, 47 F.2d 979 (D.C. Cir. 1931); Kelley v. Pittsburgh, 104 U.S. 78 (1881); Antieau, op. cit. supra note 3, § 1.01; Dillon, op. cit. supra note 3, § 352; McQuillin, op. cit. supra note 4, § 284.

[6]Newark v. New Jersey, 262 U.S. 192 (1922); Trenton v. New Jersey, supra note 3; Forsyth v. Hammond, 166 U.S. 506 (1897); Williams v. Eggleston, 170 U.S. 304 (1897).

[7]Worcester v. Street Railway Co., supra note 3; U.S. v. Railroad Co., supra note 3; Dartmouth College v. Woodward, 4 Wheat. 463, 505 (1809) (concurring opinion); Antieau, op. cit. supra note 3, §§ 1.21-.24; Cooley, op. cit. supra note 4, 393; Dillon, op. cit. supra note 3, § 355; McQuillin, op. cit. supra note 4, § 284.

[8]Hunter v. Pittsburgh, 270 U.S. 161 (1907); Kies v. Lowrey, 199 U.S. 233 (1905); Mount Pleasant v. Beckwith, 100 U.S. 514 (1879); Laramie County v. Albany County, 92 U.S. 307 (1875).

[9]Stewart v. Kansas City, 239 U.S. 14 (1915); Hunter v. Pittsburgh, supra note 8; Laramie County v. Albany County, supra note 8.

[10]Clay v. City of Eustis, 7 F.2d 141 (S.D. Fla. 1925) *appeal dismissed* 273 U.S. 781 (1925); Hunter v. Pittsburgh, supra note 8; Kelley v. Pittsburgh, supra note 5; Cooley, op. cit. supra note 4, 399; McQuillin, op. cit. supra note 3, § 284.

[11]Cooley, op. cit. supra note 4, 395.

[12]Trenton v. New Jersey, supra note 5; Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394 (1919); Hunter v. Pittsburgh, supra note 8; Kies v. Lowrey, supra note 8; Worcester v. Railway Co., supra note 3; Covington v. Kentucky, 173 U.S. 231 (1899); New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891); Williamson v. New Jersey, 130 U.S. 189 (1888); Mount Pleasant v. Beckwith, supra note 8; East Hartford v. Hartford Bridge Co., supra note 3.

[13]Hunter v. Pittsburgh, supra note 8; Kies v. Lowrey, supra note 8; Cooley, op. cit. supra, note 4, 395.

[14]Williams v. Baltimore, 289 U.S. 36 (1932); Newark v. New Jersey, supra note 6.

[15]Williams v. Baltimore, supra note 14.

[16]Antieau, op. cit. supra note 3, §§ 2.01-.04.

tract Clause.[17] Similarly, where the definition of boundaries is "palpably arbitrary and a plain abuse," it may deprive an individual of his property without due process.[18] On the other hand, however, the Court has recently refused to take jurisdiction of cases where, as here, the right to vote has been abridged through disproportionate districting on the grounds that the question is "political" and the Court is not competent to grant effective relief.[19]

In this instant case, Judge Jones, speaking for the court, accepts the broad rationale of the *Hunter, Laramie* and *Beckwith* cases[20] that a state's power over its municipalities is plenary, and concludes that the federal courts have no power to intervene. Judge Wisdom, concurring, avoids the question of power by finding an analogy with the *Colegrove* and *Peters* cases[21] which precludes judicial intervention under the "political question" doctrine. Judge Brown, dissenting, dismisses *Hunter, Laramie* and *Beckwith* as old cases, too sweeping in their language and out of harmony with recent decisions of the Supreme Court affecting other areas heretofore considered reserved to the states. Judge Brown distinguishes the present case from the *Colegrove* and *Peters* cases on the bases of the color of the litigants and the extent of their disenfranchisement. Considering the current trend in constitutional decisions, a denial of power is tenuous ground upon which to rest the decision. The case would seem to stand upon a much more enduring foundation had it been decided as a "political question." It is submitted that this would have been not only a safer course, but, assuming the court's power, the proper one. There appears to be great force in the argument of Judge Wisdom that the color of the parties is no valid distinction, that there is no difference in principle in partial and total disenfranchisement, and that there is no effective relief which the court is competent to administer.

Alfred E. Moreton

Constitutional Law—Two Theories of Constitutional Interpretation

The Illinois Central Railroad Company, which operates a line through the town of Sumner, Mississippi, one of the two county seats of Tallahatchie County, and which maintains a depot at that point with an agent to serve the public, petitioned the Public Service Commission to discontinue their agencies from January through August each year. The

[17]Shapleigh v. San Angelo, 167 U.S. 646 (1896); Meriwether v. Garrett, 102 U.S. 472 (1880); Mount Pleasant v. Beckwith, supra note 8; Memphis v. U.S., 97 U.S. 293 (1887); Broughton v. Pensacola, 93 U.S. 266 (1876); Dillon, op. cit. supra note 4, § 336; McQuillin, op. cit. supra note 4, § 261.

[18]Myles Salt Co. v. Iberia Drainage Dist., 239 U.S. 478 (1915); Houck v. Little River District, 239 U.S. 254 (1915).

[19]South v. Peters, 89 F. Supp. 672 (N.D. Ga. 1950) *aff'd* 339 U.S. 276 (1950); McDougall v. Green, 335 U.S. 281 (1948); Turman v. Duckworth, 68 F. Supp. 744 (N.D. Ga. 1946) *appeal dismissed* 329 U.S. 675 (1946); Cook v. Fortson, 68 F. Supp. 624 (N.D. Ga. 1946) *appeal dismissed* 329 U.S. 675 (1946); Colegrove v. Green, 328 U.S. 549 (1946); Wood v. Broom, 287 U.S. 1 (1932).

[20]See note 8 supra.

[21]See note 19 supra.

town of Sumner contested the petition. The Public Service Commission, holding that the proposal as contained in the petition, would not conform to the provision of section 187 of the Mississippi Constitution,[1] declined to grant the relief prayed for. On appeal to the Circuit Court, it was held that the railroad's proposal would amount to a substantial compliance with the constitution and that elasticity in interpretation should be indulged in order to meet changed economic conditions. From the judgment entered, the town appealed. HELD: Reversed. *Town of Sumner v. Illinois Central Railroad Co.*, 111 So. 2d 230 (Miss.1959).

A constitution, like other laws, is subject to construction by the courts, but the object in construing a written constitution is to ascertain and give effect to the intent of the framers and the people who adopted it.[2] Since the early days of constitutional interpretation there has been a sharp line of division between two theories. Courts have had to determine whether to adopt the words of the constitution to ever changing conditions, the theory expounded by Chief Justice Marshall in *McCulloch v. Maryland*,[3] or to follow the more rigid theory that the constitution means today what it meant to the framers.

Those courts holding to the strict rule demand consideration of the purpose which induced adoption of the section under examination to properly determine its meaning.[4] The presumption is that the constitutional convention drafted the constitution with care, precision in the use of language and with a full understanding of the accepted meaning of every word.[5] A constitution should receive consistent and uniform interpretation although times, conditions and public sentiment change.[6] It has been said that "necessity" must give way to the constitution and not the constitution to "necessity."[7] Where the words of the constitution are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning and a mere reading will suffice.[8] As to any ambiguous words, the presumption is in favor of the natural or popular

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[1]"No railroad hereafter constructed in this state shall pass within three miles of any county seat without passing through same, and establishing and maintaining a depot therein, unless prevented by natural obstacles: Provided, such town or its citizens shall grant the right of way through its limits and sufficient grounds for ordinary depot purposes."

[2]Garvey v. Trew, 64 Ariz. 342, 170 P.2d 845 (1946); Rankin v. Jones, 224 Ark. 1001, 278 S.W.2d 646 (1955); Saxon v. Bell, 205 Ga. 288, 41 S.E.2d 536 (1947); Runyon v. Smith, 308 Ky. 73, 212 S.W. 2d 521 (1948); Wolfson v. Avery, 6 Ill.2d 78, 126 N.E. 2d 701 (1955); City of Jackson v. Nims, 316 Mich. 694, 316 N.W.2d 569 (1947); Boeing Aircraft Co. v. Reconstruction Finance Corp., 25 Wash.2d 521 (1948).

[3]4 U.S. (4 Wheat.) 415 (1819).

[4]State v. Burch, 226 Ind. 445, 80 N.E.2d 294 (1948); Keck v. Manning, 313 Ky. 433, 231 S.W.2d 604 (1950); Hawkins v. Carroll, 50 Miss. 735, 106 So. 215 (1874).

[5]Gibbons v. Ogden, 6 U.S. (9 Wheat.) 1 (1824); Ervin v. Collins, 85 So.2d 852 (Fla. 1956); Higer v. Hansen, 67 Idaho 45, 170 P.2d 411 (1946); In Re Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955); State v. Henry, 87 Miss. 125, 40 So. 152 (1906); School District No. 1, Multonomah Co. v. Bingham, 204 Ore. 601, 284 P.2d 779 (1955).

[6]Runyon v. Smith, 308 Ky. 73, 212 S.W.2d 521 (1948); Travelers' Insurance Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007 (1934); State v. Langlie, 45 Wash.2d 82, 273 P.2d 464 (1954); State v. Clausen, 142 Wash. 450, 253 Pac. 805 (1927).

[7]In Re Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955).

[8]Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617 (1952); Button v. Drake, 302 Ky. 517, 195 S.W.2d 66 (1946); State v. Clark, 186 La. 655, 173 So. 137 (1937); Reed v. McKeldin, 207 Md. 553, 115 A.2d 281 (1955); Kernan v. Holm, 227 Minn. 89, 34 N.W.2d 327 (1948); Caldwell v. Peterson, 153 Neb. 402, 45 N.W.2d 122 (1950).

meaning as understood by the people who ratified the constitution and not the technical one.[9]

Courts following the more liberal theory of interpretation believe that the constitutions should be adaptable and not interpreted too literally.[10] A constitution usually announces certain basic principles to serve as the perpetual foundation of the state. It is not intended to be a limitation on its healthful development nor an obstruction to its progress.[11] Constitutions are not made for existing conditions only, therefore their terms and provisions are being constantly expanded and enlarged by court construction to meet the advancing and improving affairs of men.[12] It has been argued that because the meaning or principles of a constitution remain fixed and unchanged from the time of its adoption it should not receive too narrow or literal an interpretation, but the meaning given it should be applied in such a manner as to meet new or changed conditions as they arise.[13] A constitution is a "living thing" designed to meet the needs of a progressive society. It is primarily a declaration of principles and must be interpreted so as to be adaptable to the changed conditions of the present state of society.[14] Courts adhering to the "adaptability" doctrine of interpretation deny the need to define the words of a constitution as they would have been defined by the framers and people adopting. A constitution is intended to endure for all time and, to restrict the meaning of the words to the way they were understood by the framers, would fetter the constitution and make it only a temporary document.[15] Likewise it is said that the framers of the constitution must be credited with sufficient foresight to foresee changes and to anticipate the necessity of adapting their words to such changes.[16]

Clearly a court, confronted with a problem of constitutional construction, has two clear cut alternatives, each supported by an impressive line of authority. It is submitted that the majority of the court in the case under consideration chose, with all deference to the logical arguments contained in the dissent, the better alternative for this case. As pointed out in the dissent, at the time the constitution was drafted, railroads were probably the most important means of public transportation

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[9]Wilson v. Crews, 160 Fla. 169, 34 So.2d 114 (1948); Lincoln v. Secretary of Commonwealth, 326 Mass. 313, 93 N.E.2d 744 (1950); Household Finance Co. v. Shaffner, 356 Mo. 808, 203 S.W.2d 734 (1947).

[10]Carlton v. Matthews, 103 Fla. 301, 137 So. 815 (1931); Clauss v. Board of Education of Ann Arundel County, 181 Md. 513, 30 A.2d 779 (1943); City of Jackson v. Deposit Guaranty Bank, 160 Miss. 732, 133 So. 195 (1931); Moore v. General Motors Acceptance Corp., 155 Miss. 818, 125 So. 411 (1930).

[11]11 Am. Jur., Constitutional Law § 51.

[12]Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Gaiser v. Buck, 203 Ind. 9, 179 N.E. 1 (1931); Brown v. Smallwood, 130 Minn. 492, 153 N.W. 953 (1915); Payne v. City of Racine, 217 Wis. 550, 259 N.W. 437 (1935).

[13]U.S. v. Classic, 313 U.S. 299 (1941); Fowler v. Obier, 224 Ky. 742, 7 S.W. 219 (1928); Dunn v. Love, 172 Miss. 342, 155 So. 331 (1934); State v. Superior Court for King County, 20 Wash. 138, 146 P.2d 543 (1944); Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (1911).

[14]Missouri v. Holland, 252 U.S. 416 (1920); Grauman v. Jefferson County Fiscal Court. 273 Ky. 674, 117 S.W.2d 918 (1938); Moore v. General Motors Acceptance Corp., 155 Miss. 818, 125 So. 411 (1930); State Railway Commission v. Ramsey, 151 Neb. 333, 37 N.W.2d 502 (1949); Purser v. Ledbetter, 277 N.C. 1, 40 S.E.2d 702 (1946).

[15]Moore v. General Motors Acceptance Corp., 155 Miss. 818, 125 So. 411 (1930).

[16]Trahan v. State Highway Commission, 169 Miss. 732, 151 So. 178 (1933); Ex Parte Tucker, 164 Miss. 20, 143 So. 700 (1932).

available. The fact that a special constitutional section was drafted requiring the construction of a depot at the county seat helps bear this out. Although changed times have lessened the importance of the depot in Sumner, and modern highway travel makes the existing agency depot in nearby Webb more convenient to the railroad passenger or shipper, the constitution requires the depot to be "established and maintained" in Sumner. From the historical point of view, could it be reasonably argued that the framers of the Mississippi Constitution did not have an agency depot in mind when, in the late 1880's, they drafted Section 187? The county seat was a very important place in the lives of the people of that day. Citizens traveled often to the county seat to pay taxes, record deeds, seek professional services, or appear in court. A full time agent at the busy railroad depot would have been a necessity in order to give satisfactory service to the public. As pointed out in the decision, a depot was not a locked building without personnel. It was admitted that the depot in Sumner still receives some business, therefore the railroad agent is not completely idle. Were he taken away from the Sumner depot, the consignee picking up incoming shipments would be required to obtain a key to the railroad's warehouse, unlock it and claim his shipment. Breakage and damage to shipments could not be pointed out, nor could damage claims be made to that office. Moreover, the railroad company would accept no responsibility for a shipment left in its warehouse by a consignor until one of its employees picked up the bill of lading. In short, no small inconvenience to the citizens would result from the discontinuance of Sumner's agency depot. While it is interesting to look at these arguments in favor of maintaining the agent at the depot, they cannot control the decision. The words of the constitution are clear. The railroad company must "maintain" the depot in Sumner, the county seat. This could not have been made more definite. The requirement of uniform interpretation of the constitution, coupled with the framers' conception of "depot," attest to the sagacity of the court in requiring a strict construction of section 187 of our constitution.

William H. Cox, Jr.

Criminal Law—Irresistible Impulse Not Recognized as a Defense

Defendant beat her son to death with a steel poker when he came home from school with a torn coat pocket and muddy shoes. Defendant's witnesses, who were physicians, testified that such punishment would have taken at least thirty minutes to inflict. The doctors claimed that no sane person would commit such a merciless act. The court construed the defense to be that of irresistible impulse. Prosecution's witnesses, also physicians, testified that defendant knew the difference between right and wrong at the time of the commission of the act. Held: Affirmed. Irresistible impulse constitutes no defense to a crime unless such impulse springs from mental disease to such a degree as to overwhelm reason, judgment and conscience. *Burr v. State,* 114 So.2d 764 (Miss. 1959).

The defense of irresistible impulse[1] continues to find no favor with the Mississippi Supreme Court, since it was first rejected in 1934.[2] Since 1879,[3] the court has consistently held to the "right and wrong"[4] test of criminal responsibility.[5] The court has rejected the irresistible impulse doctrine for three reasons: (1) the belief that no such mental disorder is, in fact, possible;[6] (2) the difficulty of proof even if the disorder is possible;[7] (3) the dangers to society inherent in such a doctrine.[8] The first of the above reasons exists in the face of voluminous medical evidence to the effect that an impulse, resulting from mental disease or defect, may be irresistible.[9] The second reason for rejecting the defense seems inadequate, as it appears no more difficult to apply the test of irresistible impulse than the right and wrong test. The difficulty does not lie in the irresistible impulse test, but is inherent in the subject of insanity itself.[10] Insanity in any form is frequently difficult to determine with certainty, and yet all courts recognize that if an accused does not know right from wrong and does not know the nature and quality of the act charged, he should not be punished.[11] The last reason for rejecting the defense of irresistible impulse is unsubstantiated by evidence of any such dangerous effects in those states where the test has been accepted.[12]

The court, in this case, as in *Johnson v. State*,[13] continues to reject the defense of irresistible impulse, in the face of overwhelming psychiatric opinion[14] that an impulse, resulting from mental disease or defect, may be irresistible. The exclusive adherence to the right and wrong test of determining criminal responsibility often results in confusing the jury, which demonstrates a serious defect of the test. The courts, in effect,

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[1]Even if the accused be unimpaired in his mental perception of right and wrong, yet, if his mind, by reason of disease or defect, is rendered powerless to control his will, he is not criminally responsible. Eatman v. State, 169 Miss. 295, 153 So. 381 (1934).

[2]Eatman v. State, supra note 1.

[3]Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360 (1879).

[4]If an accused be able, at the time the act was committed, to realize and appreciate the nature and quality thereof, i.e., to distinguish right from wrong, he is guilty. Eatman v. State, 169 Miss. 295, 153 So. 381 (1934).

[5]Johnson v. State, 223 Miss. 56, 76 So.2d 841 (1955); Eatman v. State, supra note 4; Garner v. State, 12 Miss. 317, 73 So. 50 (1916); Smith v. State, 95 Miss. 786, 49 So. 945 (1909); Singleton v. State, 71 Miss. 782, 16 So. 295 (1894); Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360 (1879).

[6]"The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical, and too incapable of a practical solution, to afford a safe basis of legal adjudication." Cunningham v. State, supra note 5.

[7]Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360 (1879).

[8]"The adoption of any other test of criminal responsibility [than the right and wrong test] would be impracticable, and would result in opening wide the door for the escape of criminals on the ground of uncontrollable impulse, irresistible inclination, etc." Smith v. State, 95 Miss. 786, 49 So. 945 (1909).

[9]Keedy, Irresistible Impulse as a Defense in the Criminal Law, 100 U. Pa. L. Rev. 986, 989, n. 201 (1952).

[11]State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

[12]"No statistics have ever been published tending to prove that the recognition of irresistible impulse as a defense has tended to break down the administration of justice." Weihoffen, Insanity as a Defense in Criminal Law 58 (1933). "That the defense of irresistible impulse constitutes a threat to the security of society does not stand up under the light of experience." Hodemaker, Irresistible Impulse as a Defense in Criminal Law, 23 Wash. L. Rev. 1, 7 (1948).

[13]223 Miss. 56, 76 So.2d 841 (1955).

[14]Keedy, supra note 9.

charge the juries, as a matter of law, that no mental disease exists which destroys a person's power of self-control, but leaves unimpaired his mental consciousness of right and wrong. Prior to the court's charge, expert witnesses may have testified to a contrary opinion.[15] This conflict illustrates the two principal objections to the right and wrong test: (1) The test of criminal responsibility which the courts have set forth, is not in harmony with scientific opinion;[16] and (2) the courts have undertaken to declare that to be law which is a matter of fact.[17] The Alabama court, in *Parsons v. State*,[18] set out what seems to be the two necessary elements of any proper test of criminal responsibility: (1) capacity for intellectual discrimination between right and wrong, and (2) freedom of will. The right and wrong test includes only the first of these two necessary elements, while the irresistible impulse test embraces both elements. Though there is no apparent general trend toward adoption of the irresistible impulse test, it has been recognized and approved in Alabama,[19] Illinois,[20] Kentucky,[21] Massachusetts,[22] Pennsylvania,[23] and Utah.[24] The requisite elements are also embraced in the test advanced by the United States Court of Appeals for the District of Columbia Circuit, in *Durham v. U.S.*[25] According to this test an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.[26] An advantage exists in the use of this test because the jury need not be required to rely on individual symptoms as a criterion, but all relevant evidence as to mental condition can go to the jury upon the ultimate question of fact.

It is submitted that the right and wrong test of criminal responsi-

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[15]Parsons v. State, 8 Ala. 577, 2 So. 854 (1887). Medical experts are almost unanimous in their view that knowledge of right and wrong does not, by itself, scientifically categorize a person as sane. "As a result of observation and experience, in all lunatics, and in the most degraded idiots, whenever manifestations of any mental action can be educed, the feeling of right and wrong may be proved to exist." Bucknill, Criminal Lunacy 59. Dr. Peter Bryce, a former superintendent of the Alabama Insane Hospital, for 25 years, is quoted by the court, in Parsons v. State, as saying, "It seldom happens that we meet with an insane person who cannot be made to discern, to some feeble extent, his duties to himself and others, and his true relations to society." The court further stated, "The whole management of asylums presupposes a knowledge of right and wrong on the part of their inmates."

[16]Courts have undertaken to say what are the invariable or infallible tests of such disease, and all have proved a confessed failure in practice. The symptoms and causes of insanity are so variable, and its pathology so complex, that no two cases may be exactly alike. The fact of its existence is never established by any single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case. Parsons v. State, 8 Ala. 577, 2 So. 854 (1887).

[17]If the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself to be qualified to testify as an expert. Parsons v. State, supra note 16.

[18]Parsons v. State, 8 Ala. 577 2 So. 854 (1887).

[19]Boyle v. State, 229 Ala. 21, 154 So. 575 (1934).

[20]People v. Varecha, 353 Ill. 52, 186 N.E. 607 (1933).

[21]Murrell v. Commonwealth, 291 Ky. 65, 163 S.W.2d 1 (1942).

[22]Commonwealth v. McCann, 325 Mass. 510, 91 N.E.2d 214 (1950).

[23]Commonwealth v. Foltz, 5 Pa. 559.

[24]State v. Green, 78 Utah 580, 6 P.2d 177 (1931).

[25]214 F.2d 862 (D.C. Cir. 1954).

[26]This test was first introduced in the opinion of Doe, J., in State v. Pike, 49 N.H. 399, 6 Am. Rep. 533 (1870). It received scant approval by other courts until the Durham decision, in 1954. In that same year, the New Mexico court, in State v. White, 58 N.M. 324, 270 P.2d 727 (1954), adopted a test approaching the Durham test.

bility has outlived its usefulness, and that the better test is either the irresistible impulse test, or the *Durham* test, or some other test which recognizes the impairment of volition by reason of mental disease.

Robert Glenn Barnett

Criminal Law — Robbery — Necessity That Apprehension of Victim Be Actual

The defendant, holding a sack in his hand, entered a tailor shop, which was momentarily empty, approached a woman employee, and demanded that she open the cash register and hand him the money therefrom. She refused, and the defendant said, "Lady, this is a gun I have in this sack, and I don't have much time." The defendant then pulled from the sack "what looked like a gun handle . . ." The employee opened the cash register but refused to hand the defendant the money. At this moment the owner entered the shop, whereupon the defendant snatched the bills from the cash register and ran. The employee testified that prior to the taking by the defendant, she was not afraid for her life or of serious bodily injury. Held: Affirmed. The facts establish the offense of robbery under the Texas statute,[1] rather than merely theft, notwithstanding that the victim was not afraid for her life or of serious bodily injury at the time of the alleged offense. *Cassidy v. State,* 324 S.W. 2d 857 (Tex. Crim. App. 1959).

At common law, robbery is the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence, or by putting him in fear.[2] Where all these elements are present, including actual violence or a putting in fear, the offense is robbery, and not larceny or theft.[3] On the other hand, where a pocket is picked,[4] or where the property is snatched away without antecedent violence or a putting in fear, the offense is theft or larceny, not robbery.[5] The "putting in fear" referred to, in order to support a conviction of robbery must be sustained by evidence of acts or conduct or words or

[1]Tex. Penal Code art. 1408: If "any person, by assault, or violence or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; . . . ."

[2]Williams v. Commonwealth, 20 Ky. 1850, 50 S.W. 240 (1899); Houston v. Commonwealth, 87 Va. 257, 12 S.E. 385 (1890).

[3]Alaniz v. State, 147 Tex. Crim. 1, 177 S.W.2d 965 (1944); Anderson v. State, 132 Tex. Crim. 255, 103 S.W.2d 753 (1937); Jarrot v. State, 96 Tex. Crim. 239, 257 S.W. 256 (1924); Gallagher v. State, 34 Tex. Crim. 306, 30 S.W. 557 (1895).

[4]Fanning v. State, 66 Ga. 167 (1880); State v. John, 50 N.C. 163, 169 Am.Dec. 777 (1857); Hammond v. State, 121 Tex. Crim. 596, 49 S.W.2d (1932).

[5]Thomas v. State, 91 Ala. 34, 9 So. 81 (1891); Jackson v. State, 114 Ga. 826, 40 S.E. 1001 (1902); Harris v. State, 118 Tex. Crim. 597, 39 S.W.2d 888 (1931); Jarrot v. State, 96 Tex. Crim. 239, 257 S.W. 256 (1924); Johnson v. State, 35 Tex. Crim. 140, 32 S.W. 537 (1895).

circumstances reasonably calculated to effect that result.[6] No case has been discovered in any jurisdiction, including Texas, where the offense has been labeled robbery where there was an absence of both force and an actual "putting in fear", even though the acts of the defendant might reasonably warrant such fear. The applicable Texas statute[7] provides in the alternative another element by which the offense committed may constitute robbery; that is, the element of *assault,* which is not found in the common law definition.[8] The generally accepted meaning of criminal assault is that it is an offer or attempt to do injury to the person of another.[9] This definition does not require an actual "putting in fear" or any apprehension on the part of the victim,[10] although there is at least one jurisdiction which indicates that the rule might be otherwise.[11] Texas apparently does not align itself with the latter, since its statute defining assault is definite in its terms and makes no mention concerning the state of mind of the victim.[12]

Since the Texas statute defining assault[13] does not require actual apprehension of the victim or an actual "putting in fear" to constitute criminal assault, it is clear that the acts of the defendant in brandishing his pistol do constitute an assault, although Davidson, J., dissenting in the case noted, was of a contrary opinion, without assigning reason therefor. Even though it be admitted that there was a criminal assault in the case noted, it is submitted that it was not such an assault as to bring the acts of the defendant within the terms of the Texas robbery statute,[14] for the statute seems to require that the assault be the *means* by which the property is taken, thereby impliedly requiring an actual fear or intimidation on the part of the victim. Clearly the acts of the defendant had no such effect, and failing to put his victim in fear, the defendant simply snatched the property and ran, thereby making the offense *theft* rather than robbery, since the defendant failed to take the property "by assault, or violence, or by putting in fear of life or bodily injury."[15] A construction of the robbery statute[16] requiring the assault mentioned to be effective in producing an actual fear seems to be the better interpretation; first, because the gist of the crime of robbery has historically been a taking of the property of another by means of actual force or actual intimidation; second, because there applies to

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[6]Long v. State, 12 Ga. 293 (1852); Steward v. People, 224 Ill. 434, 79 N.E. 637 (1906); Davis v. Commonwealth, 21 Ky. 1295, 54 S.W. 959 (1900); Peebles v. State, 138 Tex. Crim. 55, 134 S.W.2d 298 (1939); Easley v. State, 82 Tex. Crim. 238, 199 S.W. 476 (1917).

[7]See note 1 supra.

[8]Cf. note 2 supra.

[9]State v. Brewer, 31 Del. 363, 114 Atl. 604 (1921); State v. Straub, 190 Iowa 800, 180 N.W. 869 (1921); State v. Fine, 324 Mo. 194, 23 S.W.2d 7 (1929); State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

[10]Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42 (1885); People v. Lilley, 43 Mich. 521, 5 N.W. 982 (1880); State v. Godfrey, 17 Ore. 300, 20 Pac. 625 (1889); Ross v. State, 16 Wyo. 285, 93 Pac. 299 (1908).

[11]Smith v. State, 39 Miss. 521 (1860).

[12]Tex. Penal Code art. 1138: "*Any* attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault." (Emphasis added).

[13]See note 12 supra.

[14]Tex. Penal Code art. 1408.

[15]Ibid.

[16]Ibid.

the circumstances of the case noted the renowned legal maxim that statutes in derogation of the common law are to be construed strictly; and third, because the offender can be held criminally responsible for another offense, theft, in regard to which it is clear that the elements of force and putting in fear, actually or otherwise, are not required.

John E. Mulhearn, Jr.

Income Taxation—Failure to File a Declaration as Not Constituting a Substantial Underestimation under the 1939 Code

Respondent, Fred N. Acker, without reasonable cause, failed to file a declaration of his estimated income tax for the taxable years of 1947 through 1950. The Commissioner imposed an addition to the tax for each of those years under section 294 (d) (1) (A)[1] of the Internal Revenue Code of 1939, for failure to file the declaration and also imposed a further addition to the tax for each of those years under section 294 (d) (2)[2] for a "substantial underestimate" of the tax. The Tax Court[3] sustained the imposition of both additions. The Court of Appeals[4] affirmed with respect to the addition imposed for failure to file the declaration, but reversed with respect to the addition imposed for substantial underestimation, holding that section 294 (d) (2) does not authorize the treatment of a tapayer's failure to file a declaration of estimated tax as the equivalent of a declaration estimating no tax, and that the regulation[5] which purports to do so, is not supported by the statute and is invalid. Held: Affirmed. Section 294 (d) (2) does not authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as the equivalent of a declaration estimating his tax to be zero, thus constituting a substantial underestimation, as the language of the statute contemplates the filing of an estimate before there can be an underestimate. *Commissioner v. Acker,* 80 Sup. Ct. 144 (1959).[6]

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[1]"Section 294 (d) (1) (A) provides, in substance, that if a taxpayer fails to make and file 'a declaration of estimated tax,' within the time prescribed, there shall be added to the tax an amount equal to 5% of each installment due and unpaid, plus 1% of such unpaid installment for each month except the first, not exceeding an aggregate of 10% of such unpaid installments." Commissioner v. Acker, 80 Sup. Ct. 144, 145 (1959).

[2]Int. Rev. Code of 1939, § 294 (d) (2) provides in part: ". . . (2) Substantial underestimate of estimated tax. "If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35)... exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser...."

[3]Fred N. Acker, 26 T.C. 107 (1956).

[4]Acker v. Commissioner, 258 F.2d 568 (6th Cir. 1958).

[5]Treas. Reg. 111, § 29.294-1 (b) (3) (i) (1943) reads in pertinent part: "... (3) Substantial understatement of estimated tax.... (A)... In the event of a failure to file the required declaration, the amount of the estimated tax for the purpose of this provision is zero...."

[6]Overruling Hansen v. Commissioner, 258 F.2d 585 (9th Cir. 1958); Patchen v. Commissioner, 258 F.2d 544 (5th Cir. 1958); Abbott v. Commissioner, 258 F.2d 537 (3rd Cir. 1958); Palmisano v. United States, 159 F. Supp. 98 (D.C. La. 1958); Farrow v. United States, 150 F. Supp. 581 (D.C. Cal. 1957); Peterson v. United States, 141 F. Supp. 382 (D.C. Tex. 1956); Clarence F. Buckley, 29 T.C. 455 (1957); and Marcel Garsaud, 28 T.C. 1086 (1957).

Prior to this decision the question of double penalties for failure to file a declaration of estimated tax had met with a diversity of judicial opinion.[7] In the district courts few cases[8] followed the double penalty concept adhered to by the Tax Court.[9] The view followed by the Tax Court and a few district courts was that even though section 294 (d) (2) does not state that a failure to file is equivalent to an estimated tax of zero, such language is embodied in the regulation to that section[10] and has been contained therein since 1943.[11] Congress has seen fit to amend section 294 (d) (2) several times since 1943,[12] but it has not in any way indicated its disapproval of the Treasury Department's interpretation of the section as contained in its regulation.[13] Also, both the Senate Report,[14] which accompanied the bill that became the Current Tax Payment Act of 1943,[15] and the Conference Report,[16] relating to that bill, contained the statement which was incorporated into the regulation. Since it is a regulation of long standing, these courts held that it must be sustained unless "... unreasonable and plainly inconsistent with the revenue statutes...."[17] The Tax Court holds that the regulation "... reflects, rather than distorts, the will of Congress..."[18] and upholds its validity. This view has been followed recently in decisions from some of the courts of appeal.[19]

The application of the regulation in cases of failure to file an estimate was not successfully challenged until 1954, when a district court in Georgia held it invalid as imposing a double penalty.[20] Since that time other district courts as well as courts of appeal have adopted the same view.[21] The position of these courts, which was sustained by the majority in the principal case, refuses to allow the penalty for substantial underestimation unless an estimate has been filed.[22] To sustain such a penalty would dignify a Bureau regulation by giving it the force and effect of a statute.[23] If Congress had intended that section 294 (d) (2)

7Abbott v. Commissioner, supra note 6.

8Palmisano v. United States, supra note 6; Farrow v. United States, supra note 6; and Peterson v. United States, supra note 6.

9Herman J. Romer, 28 T.C. 1228 (1957); J. D. Abbott, 28 T.C. 795 (1957); Harold C. Marbut, 28 T.C. 687 (1957); Marvin Maxey, 26 T.C. 992 (1956); John R. Rictor, 26 T.C. 913 (1956); Fred N. Acker, 26 T.C. 107 (1956); Harry Hartley, 23 T.C. 353 (1954); and G. E. Fuller, 20 T.C. 308 (1953).

10Supra note 5.

11Palmisano v. United States, supra note 6.

12Id. at 100, n. 6.

13Id. at 100.

14S. Rep. No. 221, 78th Cong., 1st Sess. 42 (1943).

15The Current Tax Payment Act § 5 (b), 57 Stat. 126 (1943), 26 U.S.C.A. § 294 (1955) introduced § 294 (d) (2) into the 1939 Code.

16H.R. Conf. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943).

17Abbott v. Commissioner, 258 F.2d 537 (9th Cir. 1958).

18G. E. Fuller, 20 T.C. 308, 316 (1953).

19Hansen v. Commissioner, 258 F.2d 585 (9th Cir. 1958); Patchen v. Commissioner, 258 F.2d 544 (5th Cir. 1958); Abbott v. Commissioner, supra note 17.

20United States v. Ridley, 127 F. Supp. 3 (D.C. Ga. 1954).

21Erwin v. Cranquist, 253 F.2d 26 (9th Cir. 1958); Knop v. United States, 234 F.2d 760 (8th Cir. 1956); Barnwell v. United States, 164 F. Supp. 430 (E.D. S.C. 1958); Jones v. Wood, 151 F. Supp. 678 (D.C. Ariz. 1956); Stenzel v. United States, 150 F. Supp. 364 (N.D. Cal. 1957); Powell v. Granquist, 146 F. Supp. 308 (D.C. Ore. 1956); Owen v. United States, 134 F. Supp. 31 (D.C. Neb. 1955).

22Jones v. Wood, supra note 21.

23Stenzel v. United States, supra note 21.

apply in cases where there was a failure to file, it could have easily done so by amending the section.[24] This is a penal statute and should be interpreted liberally in favor of the taxpayer and strictly against the Government.[25]

This problem existed only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax.[26] The effect of the decision in the principal case is to settle the controversy in this area of the tax law arising under the 1939 Code, and to provide a more equitable penalty for taxpayers who fail to file a declaration. It is submitted that the result reached by the Supreme Court is a proper judicial interpretation of section 294 (d) (2). The legislative history of the original enactment is not so persuasive as to overcome the language of the section which seems to contemplate the filing of an estimate before there can be an underestimate.[27] No longer will the Commissioner be allowed to subject a taxpayer to a second penalty for the same omission for which Congress has specifically provided a separate and substantial penalty.

J. Michael Corrigan, Jr.

Section Six of Reciprocal Enforcement of Support Act Construed—Responding State May Relieve Jurisdictionally Submissive Obligor From Extradition

Complainant obligor, an Oregon resident, sought to have an order of support entered against himself in favor of his minor children and to thereby be relieved of extradition for non-support which had been ordered by the Governor of Oregon in response to a request in the form of a fugitive requisition issued by the state of Kansas charging the complainant with the crime of failing to support his children. The lower court sustained a demurrer on behalf of the respondent obligee on the grounds that "the Court has no jurisdiction of the person of the respondent, or the subject of the action." The complainant was discharged and remanded for extradition. Held: Reversed and remanded. Recognizing that the "... imposition of punishment is not the principal objective of the uniform act ...," an obligor, contemplated by Uniform Reciprocal Enforcement of Support Act, § 5,[1] 9C U.L.A., who submits to the jurisdiction of responding state, initiates support proceedings there, and who

[24]Barnwell v. United States, supra note 21.
[25]Stephan v. Commissioner, 97 F.2d 712 (5th Cir. 1952).
[26]Int. Rev. Code of 1954, §6651 (c), 6654.
[27]Commissioner v. Acker, 80 Sup. Ct. 144 (1959).

[1]Uniform Reciprocal Enforcement of Support Act, §5, 9C U.L.A.: "Interstate Rendition.—The Governor of this state (1) may demand from the Governor of any other state the surrender of any person found in such other state who is charged in this state with the crime of failing to provide for the support of any person in this state and (2) may surrender on demand by the Governor of any other state any person found in this state who is charged in such other state with the crime of failing to provide for the support of a person in such other state ...."

complies with responding state's order, may be relieved from extradition requested by demanding state, whether or not civil proceedings have been initiated in the demanding state.[2] *Lefler v. Lefler,* 344 P.2d 754 (Ore. 1959).

The Uniform Reciprocal Enforcement of Support Act[3] was formulated[4] to alleviate the indigenous obligee of the expenses of extradition, if a judgment for support had previously been obtained, and of the expense of following the refugee into his asylum and there engaging in litigation, if no prior support judgment had been obtained. The act's promulgators also wanted to ameliorate the plight of the *erstwhile* obligor who previously was subject to extradition, loss of time from gainful employment, and fine or imprisonment upon conviction. Also, his chances of reconciliation with a spouse whom he naturally considered vindictive were substantially lessened.[5] The act has a further beneficial effect, which impales the *illusive* obligor; it "... has abandoned the notion of domicile and adopted the notion of presence in the choice of law fixing the duty of support."[6] Consequently, it may lessen the number of sanctuaries open to the fugitive obligor by raising the danger of contempt charges. Under the act an obligee in a two state action may institute a civil or a criminal action in the obligee's domiciliary state, the demanding state.[7] If the action is civil and the court finds a duty of support, it sends the record to a court of the state in which the obligor resides, the responding state; this court, after obtaining jurisdiction and determining from the record and from the obligor's testimony that a duty to support exists, may issue a support order.[8] If the action is criminal and the court finds the obligor in arrears of support, it requisitions the extradition of the obligor from the responding state; the responding state issues a fugitive warrant and takes custody of the obligor.[9] Not only are these alternatives offered; the act further provides that an obligor, contemplated by part II, criminal enforcement, § 5 of the act, "... who submits to the jurisdiction of the court of *such other state* and complies

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[2]Uniform Reciprocal Enforcement of Support Act, § 6, 9C U.L.A.: "Relief from the above provisions.—Any obligor contemplated by Section 5, who submits to the jurisdiction of the court of such other states and complies with the court's order of support, shall be relieved of extradition for desertion or nonsupport... during the period of such compliance."

[3]9C Uniform Laws Ann. §§1-33; G.S. 1957 Supp. to G. S. Kans. (1949), §§23-419 to 23-446; Ore. Rev. Stat. (1957), §§110.005 to 110.291. Mississippi's counterpart of this act appears in Miss. Code Ann. (1942), §§456-01 to 456-34.

The Uniform Reciprocal Enforcement of Support Act, 1952 version, is in effect in thirty-three states and Guam; the 1950 version, in thirteen states and Puerto Rico; and the Uniform Support of Dependents Law, which is similar enough to permit reciprocity, is in effect in Georgia, Illinois, Iowa, New York, and the Virgin Islands. 30 St. Johns L. Rev. 309, 316-17 (1956).

[4]Uniform Reciprocal Enforcement of Support Act, §1, 9C U.L.A.: "Purposes.—The purposes of this Act are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto." See also: Brockelbank, Uniform Reciprocal Enforcement of Support Act, 5 Ark. L. Rev. 351 (1951).

[5]For the procedural simplicity of the act, see State of Tennessee v. Perry, 198 Tenn. 389, 280 S.W.2d 919 (1955).

[6]Brockelbank, supra note 4.

[7]Uniform Reciprocal Enforcement of Support Act, §13, 9C U.L.A.

[8]Uniform Reciprocal Enforcement of Support Act, §§13,20, 9C U.L.A.

[9]See note 1 supra.

with the court's order of support, *shall be relieved of extradition* for desertion or nonsupport . . . during the period of such compliance."[10] (Emphasis added.)

There is a dichotomy of authority as to whether § 6 of the act actually gives relief from extradition, in the absence of a concurrent civil action. Two courts construing this section have denied relief from the operation of the interstate rendition provisions,[11] and two courts have allowed the relief.[12] The conclusion of the court in *Ex parte Floyd*, that the obligor may not independently institute an action in the responding state, was the result of the court's belief that it would have only the testimony of the obligor as the basis for a support order.[13] In the case of *Sands v. Sands* the court raised, sua sponte, the question of its jurisdiction and reasoned that, if § 6 of the act were construed as plaintiff urged, an absconding obligor could flee to another state, secure a support order based upon his own testimony, and remain immune from extradition.[14] In *Jackson v. Hall*, the court granted the relief sought, being persuaded that it was not the primary purpose of the act to subject the obligor to criminal punishment, and that the court of the responding state would not issue a support order until both parties had presented their evidence.[15]

The instant court, by construing ". . . to the jurisdiction of the court of such other state . . ." as meaning submission to the court of the responding state, found that §6 of the act *allows* submission to the jurisdiction of the responding state and compliance with its support order, rather than *requires* submission to the support order of the demanding state. This decision, therefore, holds that no institution of prior civil proceedings in the demanding state is requisite to effect relief from the interstate extradition provision, since the obligor's submission to the jurisdiction of the responding state is actually an initiation of a civil proceeding. This case follows the *Jackson* case in repudiating the prior contrary constructions of the criminal enforcement provisions of the act. The court reasoned that urgency of prevention of further neglect, not punishment, is the guiding objective of the act, that fine or incarceration would render the restoration of family tranquility impossible, that the instant construction would facilitate the support of those neglected, that the court's remedial power is not impaired by the lack of delineated rules of procedure in the criminal enforcement provisions of the act, and that by no other construction could the presence of §6 be explained or its intention given effect. The present resolution of the apparent ambiguity of §6 of the act appears correct. The extradition request which is forwarded with the court record is definitely a supplementary matter, and not the vitalizing feature of the proceeding.[16] The object of proceedings under the act is to insure support from the obligor, not to confine the obligor in jail where he could earn nothing to support his dependents.[17]

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[10]See note 2 supra.

[11]*Ex parte* Floyd, 273 P.2d 820 (Calif. 1954); Sands v. Sands, 136 N.E.2d 747 (Ohio C. P. 1956).

[12]Jackson v. Hall, 97 So.2d 1 (Fla. 1957); Lefler v. Lefler, 344 P.2d 754 (Ore. 1959).

[13]*Ex parte* Floyd, 273 P.2d 820 (Calif. 1954).

[14]Sands v. Sands, 136 N.E.2d 747 (Ohio C. P. 1956).

[15]Jackson v. Hall, 97 So.2d 1 (Fla. 1957).

[16]Lefler, The Law of Conflict of Laws, § 172 (1959).

[17]Lefler, supra note 16; Brockelbank, supra note 4.

The obligor's conviction of the crime of failing to support his dependents subsequent to extradition results in loss of face with family, loss of reputation with prospective employers, a criminal record, and a disappointing continuance of state aid to the obligor's dependents. Conversely, it can not be denied that the interest of an obligee who fears that the obligor will seek still another haven would be best served by extradition, yet the rendered obligor may indulge in a debilitative inertia; nor can it be denied that the criminal enforcement section of the act sets up no procedural rules for obtaining evidence on both sides of the controversy, yet the court may, as common law courts have done, devise the needed procedure. It is submitted that courts should adhere to the reasoning and result of the *Jackson* case and of the instant case, thereby extending the spirit, effecting the purpose, and controlling the ambiguity of the act in the typical two state action, notwithstanding the lack of a pending civil proceeding in the initiating state, since to do so garners support for needy dependents.

Jack M. Dubord

TORTS—DEFAMATION—LIABILITY OF BROADCASTING STATIONS FOR DEFAMATORY STATEMENTS BY POLITICAL CANDIDATES

Corporation brought action against a broadasting station[1] to recover damages for an allegedly defamatory statement made by political candidate in television broadcast over the station's facilities. The North Dakota District Court entered judgment of dismissal in favor of station,[2] and the Supreme Court of North Dakota affirmed.[3] HELD: Affirmed. Section 315 of the Federal Communications Act,[4] providing that a station shall have no power of censorship over material broadcast by a legally qualified candidate for public office, bars a broadcasting station from removing defamatory statements from speeches by candidates and grants the stations an implied federal immunity from liability for defamatory material so broadcast. *Farmers Educ. & Coop. Union of Amer-*

[1]The political candidate making the allegedly defamatory statement was made a co-defendant, but no appearance was made on behalf of the candidate.

[2]Farmers Educ. & Coop. Union of America v. Townley, 15 Pike & Fischer Radio Regulations 2058 (N.D. Dist. Ct. 1957). The District Court held the station immune under § 315 of the Federal Communications Act, but struck down a state statute, N.D. Rev. Code § 14-0209 (Supp. 1957), which would have granted WDAY an immunity, as in violation of §§ 9, 11, and 22 of the Constitution of North Dakota saving to "every man" a court remedy for any injury done his "person or reputation."

[3]Farmers Educ. & Coop. Union v. WDAY, Inc., 89 N.W.2d 102 (N.D. 1958). WDAY, Inc. took no exception to the order of the District Court declaring the state immunity statute void, so the quesion of the statute's constitutionality was not before the state Supreme Court.

[4]48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315 (1952). Subsection (a) reads: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

ica v. WDAY, Inc., 79 Sup. Ct. 1302 (1959).[5]

Prior to the noted decision, there had been two unresolved questions of statutory interpretation revolving around section 315: first, whether the statute forbids the censorship of defamatory material broadcast by candidates for which the station might be held liable under state law; and, second, whether the statute, if it prohibits censorship of defamatory statements, provides the licensee[6] with a federal immunity from liability. The first, and for many years the only, judicial decision dealing with the censorship provision held that a station could remove defamatory statements from political broadcasts.[7] In 1948 in *Port Huron Broadcasting Co.*[8] the Federal Communications Commission (FCC), the body entrusted with administering the act, set forth its views. The FCC took the position that censorship of any kind was prohibited to the station operating within the realm of section 315.[9] The legislative history of the provision, prior to and after its first enactment in 1927,[10] is indicative of a hostility toward censorship by the licensee.[11] Consequently, with considerable uniformity, recent judicial interpretations have held that licensees have no censorship power.[12] As to the second question, the FCC, in the *Port Huron* case, took the position that the Communications Act occupied the field of defamation with respect to broadcasts under section 315, thereby pre-empting any state from imposing liability on a licensee operating under the section.[13] The FCC supported its position with regard to immunity from liability under state law by relying on *Sola Elec. Co. v. Jefferson Elec. Co.*[14] and *O'Brien v. Western Union Tel. Co.*,[15] and analogized the broadcasting station proceeding under section 315 to the telegraph company transmitting interstate messages, stating that in both instances the federal law requires that the massage be re-

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[5]5-4 decision, with JJ. Frankfurter, Harlan, Whittaker, and Stewart dissenting. The dissenting Justices agreed with the majority's holding that WDAY could not have lawfully deleted the defamatory remarks, but disagreed that § 315 grants a federal immunity to the station—the dissenters felt that the federal statute leaves to the states the power to determine the nature and extent of the liability, if any, of broadcasters under such circumstances.

[6]All radio and television stations operate in interstate commerce, are subject to regulation by Congress as such, and must be licensed by the Federal Communications Commission.

[7]Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933), as the case had become moot through settlement.

[8]12 F.C.C. 1069 (1948).

[9]Id. at 1074.

[10]44 Stat. 1170 (1927).

[11]See the noted case, 79 Sup. Ct. at 1305, n. 6.

[12]Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958); Felix v. Westinghouse Radio Stations, 89 F. Supp. 740 (E.D. Pa.), *rev'd on other grounds*, 186 F.2d 1 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951); Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955); Josephson v. Knickerbocker Broadcasting Co., Inc., 179 Misc. 787, 38 N.Y.S.2d 985 (1942). But see Daniell v. Voice of New Hampshire, Inc., 10 R. R. 2045 (N.H. Super. Ct. 1954); Houston Post Co. v. United States, 79 F. Supp. 199 (S.D. Tex. 1948).

[13]12 F.C.C. at 1074. The actual speaker may be liable for his remarks, as § 315 does not protect the speaker against civil or criminal liability. 12 F.C.C. at 1074, n. 4. It seems that the actual speaker may be entitled to a qualified privilege under the common law of defamation. Charles Parker Co. v. Silver City Crystal Co., supra note 12.

[14]317 U.S. 173, 176 (1942). In this case, the Supreme Court considered the relationship between federal statutes and conflicting state statutes or common law rules.

layed as submitted; therefore, the broadcasting station, like the telegraph company, is relieved by operation of federal law from any responsibility for defamatory material.[16] A decision reaching the issues has found an implied immunity in section 315 for stations operating under its provisions.[17] In all the decisions concluding that a licensee has no immunity,[18] the section was construed to permit a station to censor potential defamation.[19] Legislative history falls short of offering authoriative assistance toward answering the question of immunity due to its unusually contradictory course.[20] On account of uncertainty as to the result Congress intended under section 315 and the pressure of the well organized National Association of Radio and Television Broadcasters which wanted express immunity, Mississippi[21] and forty-three other states[22] have passed statutes which grant varying degrees of protection to licensees. Even at common law, the provision against censorship has been held to give a qualified privilege under state law to the stations.[23]

In answering both the previously unresolved questions in the affirmative, the Supreme Court has completed the pattern established by the FCC in the *Port Huron* case and by the states with thier protective statutes, thereby affording complete protection[24] to the stations against liability for defamation uttered by political candidates over their facilities. Due to the Mississippi statutory provision granting immunity,[25] the licensee operating in Mississippi was probably already fully protected, although it is conceivable that the Mississippi statute, if tested, could be declared unconstitutional as violative of the Mississippi constitutional provision[26] guaranteeing every person a judicial remedy by due course of law for an injury done him in his "person" or "reputation."[27]

C. Willis Connell, Jr.

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[15]113 F.2d 539 (1st Cir. 1940). This case concluded that telegraph companies, as common carriers, are immune from liability in state libel proceedings.

[16]12 F.C.C. at 1075, 1076. The decision in the Port Huron case caused great consternation among members of the broadcasting industry, particularly pertaining to this question of a federal immunity, for if the stations deleted defamatory material from political speeches, they would be violating the act in the eyes of the FCC; on the other hand, if the stations allowed defamation, they could be subject to liability for their actions under state law since state courts might not feel obliged to follow the FCC's interpretation. Daniell v. Voice of New Hampshire, Inc., supra note 12.

[17]Lamb v. Sutton, supra note 12.

[18]Daniell v. Voice of New Hampshire, Inc., supra note 12; Sorensen v. Wood, supra note 12. Cf. Houston Post Co. v. United States, supra note 12.

[19]Ibid.

[20]See the noted case, 79 Sup. Ct. at 1306, 1307.

[21]Miss. Code Ann. § 1059.5 (2) (1942) provides, without mentioning censorship, that stations will not be liable for defamatory broadcasts made by candidates. This statute has never been construed by the Mississippi Supreme Court.

[22]Friedenthal and Medalie, The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act, 72 Harv. L. Rev. 445, 485 (1959).

[23]Charles Parker Co. v. Silver City Crystal Co., supra note 12; Josephson v. Knickerbocker Broadcasting Co., supra note 12.

[24]It is submitted that such absolute protection could offer substantial temptation for abuse by an unscrupulous broadcasting station.

[25]Supra note 21.

[26]Miss. Const. art. 3, § 24.

[27]See note 2 supra. Note the similarity between the Mississippi constitutional provision and the North Dakota constitutional provision under which the North Dakota District Court declared the immunity statute unconstitutional.

TORTS—RIGHT OF PRIVACY

Theresa Aquino eloped and married John N. Masciocchi. After the wedding the couple parted; Theresa returned to the home of her parents, and John returned to his own home. The marriage was never consummated. Later John told Theresa that he married her only to spite her parents who had been opposed to his courting her. Theresa was granted a divorce on the basis of fraud. Defendant, Bulletin Company, published an article relating the marriage, courtship and divorce of Theresa and John. The article was entitled "Marriage for Spite" and was accompanied by an illustration showing a girl standing in front of a theatre with her arms around a man who had his hat on the back of his head, a "drooping" cigarette in his mouth, and his "eyes to the ground." "Since John Was Barred From Her Home, Theresa Met Him on a Street Corner" appeared beneath the illustration. It was not a picture of Theresa or John. Though the facts of the article were basically true, the author "embellished and fictionalized them."[1] The article gave the names of Theresa's parents and told of their part in the events. Action was brought by Theresa[2] and her parents against the Bulletin Company for unwarranted invasion of their right of privacy. The lower court found for the defendant as to Theresa and for the plaintiffs as to the parents. Theresa did not appeal. The Bulletin Company appealed from the decision for the parents. HELD: *Affirmed.* Although the article was based on a privileged newsworthy event,[3] it was for the jury to determine if the article was such a sensational version of the facts, embellished with matter drawn from the writer's imagination, that it transcended the scope of proper immunity pertaining to the publication of news and constituted an unwarranted invasion of plaintiffs' right of privacy. *Aquino v. Bulletin Co.*, 154 A.2d 422 (Pa. 1959).

The right of privacy was not recognized as an independent cause of action until after 1890.[4] In 1890 Samuel D. Warren and Louis D. Bran-

[1]The following are excerpts from the article: "Midsummer heat slowed the steps of most of those in the early evening crowd . . . only two persons, a girl of 20 and a young man of 22, impelled as if by a jointly felt urgency, walked rapidly, unmindful of the temperature and the throng." . . . "These were clandestine meetings. The girl's parents did not know of them. But they were innocent meetings; there were no long absences; no out of town trips." The court commented: "Only by reading the article can one appreciate how the author permitted his imagination to roam through the facts, and how newsworthy events were presented in a style used almost exclusively by writers of fiction."

[2]Theresa had married again before the action was brought. At the time of the suit her name was Theresa Allizzo.

[3]"There is no unwarranted invasion of a right of privacy in the description of a wedding even though it is intended to be entirely private. Restatement of the Law of Torts §867 (d). Neither can there be an unwarranted invasion of the right of privacy by reporting, within a reasonable time, the issuance of a marriage license, the official recording of the marriage, the filing of a divorce action, or the granting of a divorce decree, regardless of how anxious the parties involved may be to keep the information from the public. These are newsworthy events of public or general interest which the press is privileged to report as news." Aquino v. Bulletin Co., 154 A.2d 422, 427 (Pa. 1959).

[4]"The protection of privacy was a matter of individual effort. The recognition of a right of action for invasion of the right of privacy is an outgrowth of the complexities of our modern civilization and doubtless due to the wider range of publicity." Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133 (1945).

deis wrote an article in the *Harvard Law Review*[5] supporting the recognition of such a cause of action. Since that time a right of privacy has been recognized in most jurisdictions. Apparently, the existence of the right is now denied in only three states.[6] Several other states, including Mississippi,[7] have not yet passed on the question. Although "no other tort has received such an outpouring of comment in advocacy of its existence,"[8] and though there has been a considerable amount of litigation on the subject during the sixty years of its development, ". . . the outlines of the right and the privilege to invade it are still dimly marked."[9] "The 'right of privacy' has been defined as the right of an individual to be let alone . . ."[10] The invasion of this right has been referred to as the "publicizing of one's private affairs with which the public has no legitimate concern."[11] The right of privacy is a personal right and can only be sued upon by the person whose privacy has been invaded.[12] Some courts have held that a spoken word could not be the basis of such an action;[13] however, from recent decisions it would appear that a spoken word can be the basis of an action for invasion of the right of privacy.[14] It is not necessary that the plaintiff allege special damages,[15] or that the

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[5]Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890). The article reviewed a number of cases in which relief was afforded on the basis of defamation, invasion of some property right, or breach of confidence or an implied contract. The conclusion was that these decisions were in reality based upon a broader principle which was entitled to separate recognition.

[6]Henry v. Cherry, 30 R. I. 13, 37 A.97 (1909); Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. Civ. App. 1952); and Yoeckel v. Samonig, 227 Wis. 430, 75 N.W.2d 925 (1956).

[7]The only Mississippi case involving the question is the case of Martin v. Dorton, 210 Miss. 668, 50 So.2d 391 (1951). This was a case in which a sheriff had knocked a photographer down and kicked him for taking his picture. In the law suit that followed, the sheriff set up as a defense a technical assault by way of invasion of his right of privacy. In commenting on this defense the Mississippi Supreme Court said: "The defense interposed herein is predicated upon that distinct and independent legal concept which has now become known in American jurisprudence as the 'right of privacy,' but which may be more precisely defined as the right to be let alone." After pointing out that the majority of those courts who have dealt with the problem have recognized the right, and that Mississippi has had no occasion to determine the question, the court stated: "We merely recognize and apply here the rule adopted in other jurisdictions in holding that a public officer cannot complain that his right of privacy has been invaded when his photograph is taken for publication in connection with a legitimate news story."

[8]Prosser, Torts, p. 636 (2nd ed. 1955).

[9]Leverton v. Curtis Pub. Co., 192 F.2d 974 (3rd Cir. 1951).

[10]Meetz v. Associated Press, 230 S. C. 330, 95 S.E.2d 606 (1956).

[11]Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948).

[12]Kelly v. Johnson Pub. Co., 160 Cal. App.2d 718, 325 P.2d 659 (1958); Metter v Los Angeles Examiner, 35 Cal. App.2d 304, 95 P. 2d 491 (1939); Kelley v. Post Pub. Co., 327 Mass. 275, 98 N.E.2d 286 (1951); and Schuyler v. Curtiss, 147 N.Y. 434, 42 N.E. 22 (1895).

[13]Metter v. Los Angeles, supra note 12; Cason v. Baskin, 155 Fla. 189, 20 So. 2d 243 (1944); and Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).

[14]In a case where a bill collector followed a waitress while she was on duty at the place of her employment, saying, "I think you're deadbeats. I don't think you intended to pay for the furniture when you got it!" the court decided that the waitress had a good cause of action. It was said in that case that "the oral publication of a private matter with which the public has no proper concern may be just as devastating and damaging as a written communication." Biederman's Inc. v. Wright, 322 S.W. 2d 892 (Mo. 1959); accord, Housh v. Peth, 99 Ohio App. 485, 135 N.E.2d 440 (1955); and Bennett v. Norban, 396 Pa. 94, 151 A.2d 467 (1959).

[15]Smith v. Doss, supra note 11; Cason v. Baskin, 159 Fla. 21, 30 So.2d 635 (1947); and Brents v. Morgan, supra note 13. In Housh v. Peth, supra note 14, the court

invasion be accompanied by malice.[16] The truth of a statement is no defense.[17] "One of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest."[18] "Everyone will agree that at some point the public interest in obtaining information becomes dominant over an individual's desire for privacy."[19] One court said "... we would permit limited scrutiny of the private life of any person who has achieved, or has had thrust upon him the questionable and indefinable status of a 'public figure.' "[20] Even if one is not a "public figure," his association with events of public interest will give the public an interest in his affairs to that extent.[21] Matters of public record have been held to be privileged.[22] Different courts have used different tests in determining whether a publication is privileged or is an invasion of the plaintiff's right of privacy. Generally, the conduct of the defendant must be that which would offend a person of ordinary sensibilities; it must go beyond the limits of decency. A few courts, however, have tried to formulate more specific tests. In *Jenkins v. Dell Pub. Co.*,[23] the court indicated that if a publication is found to be of a newsworthy character it should be privileged.[24] In the noted case, the court attempted to distinguish between news for information and news for amusement in determining whether the publication was an invasion of the plaintiff's right of privacy.[25]

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stated that substantial damages may be recovered for injured feelings and mental anguish alone.

[16]Sidis v. F-R Pub. Corp., 113 F.2d 806 (2nd Cir. 1940); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D.C. Minn. 1948); Brents v. Morgan, supra note 13, and Meetz v. Associated Press, supra note 10.

[17]Smith v. Doss, supra note 11; Cason v. Baskin, supra note 13; and Themo v. New Eng. Newspaper Pub. Co., 306 Mass. 54, 27 N.E.2d 753 (1940).

[18]Meetz v. Associated Press, supra note 10.

[19]Sidis v. F-R Pub. Corp., supra note 16.

[20]Sidis v. F-R Pub. Corp., supra note 16. In Cason v. Baskin, supra note 15, the court defined a "public figure" as a "person who by his accomplishments, fame, or mode of living, or by adopting a profession or calling ... gives the public a legitimate interest in his doings, his affairs and his character ...."

[21]In Jones v. Herald Post Co., 230 Ky. 227, 185 S.W.2d 972 (1929) the court held that a woman whose husband had been murdered in her presence had no cause of action for the publication of her picture with remarks attributed to her concerning the death of her husband. The court said, "She was an innocent actor in a great tragedy in which the public had a deep concern." Meetz v. Associated Press, supra note 10, reached a similar result.

[22]Metter v. Los Angeles Examiner, supra note 12. Berg v. Minneapolis Star & Tribune Co., supra note 16, involved publication of events connected with a court contest over the custody of a child by divorced parents. In holding that the father did not have a cause of action the court said, "But the undeniable fact is that he (the father) had made public the most intimate and indeed scandalous occurrences of his domestic life and had them spread on the public records of a court, and, in so doing, he departed from his 'quiet peaceful life free from the prying curiosity and unmitigated gossip which accompanies fame, notoriety and scandal,' and in a sense became a quasi-public figure ...."

[23]251 F.2d 447 (1958). In that case the court said, "... Once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment ...."

[24]However, in Meetz v. Associated Press, supra note 10, the court stated that newsworthiness was not the test.

[25]The court cited as authority for this test Sutton v. Hearst Corp., 277 App. Div. 155, 98 N.Y.S.2d 233 (1950). In the Jenkins case, supra note 23, the court criticized this test saying: "... it is clear that information and entertainment are not mutually exclusive categories .... Few newspapers or news magazines would long survive if

In the Aquino case, ironically the jury found against Theresa Allizzo, the principal character in the article. However, the validity of that finding was not before the court in the present case, and it is submitted that the court reached the proper result in affirming the decision for her parents. Although the right is a personal one and the defendant should not be held liable to the parents for what was said about their daughter, the court held the evidence sufficient for the jury to have found the article an invasion of the parents' right of privacy. However, the distinction between news for information and news for amusement[26] as the test for determining whether an article is privileged, does not seem the best possible approach to the solution. There are many instances when an article may be published strictly for entertainment or amusement purposes, but would not go beyond the limits of decency. It is not suggested, however, that the test of newsworthiness alone should be applied. There are many publications, such as the one in the present case, in which although the facts related are newsworthy, the manner of their presentation is a clear invasion of one's right of privacy. It is submitted that the proper test should be the more general one, finding an invasion of the right of privacy if either the facts presented, or the manner of presentation, is such as to go beyond the limits of decency and offend a person of ordinary sensibilities.

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they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account." The Sidis case, supra note 16, would also indicate that this distinction is not the proper test. In that case it was pointed out that the article under consideration possessed great reader interest because it was both instructive and amusing. No attempt was made to draw a distinction between the two.

[26]Although drawing the distinction between news for information and news for amusement, the decision does not seem to be based entirely upon that one question. The court also stated several times that the intrusion must go beyond the limits of decency. Thus, the article could have been for amusement and not have satisfied the last mentioned test.

RECENT BOOKS

CLOSE CORPORATIONS: LAW AND PRACTICE

By F. Hodge O'Neal. Callaghan & Company, 6141 North Cicero Avenue, Chicago, Illinois, 1958. $30.00

The author, Professor of Law at Vanderbilt University School of Law, has produced a truly masterful work reflecting great ability and accuracy and a background of considerable experience and critical observation in the distinctive problems of corporations whose shares are closely held and the evolvement of a business organization with which every lawyer engaged in the general practice is acquainted. A close corporation has been variously defined as: a corporation in which the stock is held in few hands or in few families, and wherein it is not at all, or only rarely, dealt in by buying or selling, or as an incorporated enterprise in which the participants consider themselves partners inter se, or as a corporation de jure and a partnership de facto, or as a corporation in which management and ownership are substantially identical, or as a corporation whose shares are not generally traded in the securities market. Regardless of how a close corporation is defined, it has problems of creation and operation peculiar to its function, and it also and generally is subject to many of the same organizational and operational factors affecting publicly held corporations. Therefore, the subject of this two-volume work on close corporations is one which should vitally concern every Mississippi lawyer as he, in the course of a booming economy, renders service to the citizens of a state whose commercial potential is just being realized, developed and understood.

Much of what is said in the two-volume work is applicable to all corporations whose shares are not traded in the securities market, not just to those in which ownership and management coalesce, and the author develops the following attributes of the closed corporation: "(1) the shareholders are few in number, often only two or three; (2) they usually live in the same geographical area, know each other and are well acquainted with each other's business skills; (3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key men in some managerial capacity; and (4) there is no established market for the corporate stock, the shares not being listed on a stock exchange or actively dealt in by brokers; consequently little or no trading takes place in the shares."[1]

A review of a complete, technical and logically arranged work on close corporations can best serve its function by describing the general nature, sequence and arrangement of the subjects, which are as follows:

VOLUME 1

Chapter I Distinctive Needs of Close Corporations and the General Failure of Legislatures and Courts to Appreciate Them. -33 pages

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[1]Volume 1, p. 13.

Chapter II Steps Preceding Organization of a Close Corporation. -41 pages

Chapter III Molding the Corporate Form by Charter and By-Law Provision (including General Considerations; Purpose and Powers Clauses); Stock Clauses (with Emphasis on Variations and Combinations that Affect Control); Optional Charter Clauses; Preparation of By-Laws; and Precautions that Increase the Effectiveness of Charter and By-Law Provisions.-103 pages.

Chapter IV Charter and By-Law Provisions Giving Shareholders a Veto Power.-32 pages

Chapter V Control Distribution Devices: Shareholders' Agreements, Voting Trusts, Irrevocable Proxies, and Management Contracts.-105 pages

Chapter VI Protecting the Tenure and Status of Shareholder-Employees and Key Personnel.-34 pages

VOLUME 2

Chapter VII Stock Transfer Restrictions (Including Buy-Out Arrangements) .-68 pages

Chapter VIII Problems of Operation.-77 pages.

Chapter IX Problems of Dissension, Deadlock, and Dissolution (including General Considerations; Contractual Arrangements and Special Charter and By-Law Provisions as Aids in Removing Dissension and Resolving Deadlocks; Arbitration as a Device for Resolving Intra-Corporation Controversies; and Dissolution in Absence of Special Contractual Arrangement) .-68 pages

Chapter X Specimen Provisions for Charters, By-Laws, Shareholders' Agreements and Other Documents.-115 pages

Each chapter of the two-volume work begins with a discussion of its scope, contains excellent examinations of the decisions in leading states of activity, including exceptions to tthe majority view and rule on all issues and principles discussed, and the entire work is blessed with thorough and up-to-date footnotes. (Both volumes are equipped for pocket parts). Mr. Hodge conducts a detailed and careful analysis of charter and by-law provisions and optional clauses, together with warnings of pitfalls and an obviously complete review of tax considerations involved in every phase of corporate creation and operation. The discussion of stock transfer restrictions and evaluaton methods should be very helpful.

The entire work is arranged logically, written understandably and from a practical point of view, and the specimen provisions or form instruments should be of considerable assistance, though the corporation laws of our state may require modifications in several instances.

The footnotes and cross-references contain only a few Mississippi case and statute citations, which is understandable because of the history

of our economy; however, to a student of corporations, to a legislator, and to one interested in the further correct and orderly development of our corporate law and of corporations within our state, this work on close corporatons offers an unmatched opportunity for comparison and investigation in the light of the recorded experience of other states, their statutes, their decisions, and of the views and opinions of one who is obviously qualified to express himself. This two-volume work should be considered vital in the library of a general practitioner.

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MODERN CRIMINAL PROCEDURE

By Roy Moreland. Indianapolis: The Bobbs-Merrill Company, Inc., 1959. Pp. 334. $10.00.

Professor Roy Moreland has taught law at the University of Kentucky for more than 25 years. He is a Reviser for the Kentucky Legislative Research Commission on the proposed revision of the Kentucky Criminal Code and is of counsel of the law firm of Sturgill, Moreland and Turner. Criminal Law and Procedure has been Mr. Moreland's special subject for over 27 years. He is no stranger to the legal text since he has written several other books and has contributed many articles to various legal periodicals. Mr. Moreland has manifested a keen insight into the field of criminal law and he speaks as an authority in this area. The Preface of *Modern Criminal Procedure* indicates that the author has attempted to trace the development of some of the common law and constitutional devices in criminal procedure and to analyze their technical requisites.

One subject of the book is to appeal to the members of the city, county, and state police departments. These policing entities will find discussions of arrest, search and seizure, self-incrimination, as well as discussions of other problems of value in the training of recruits and for refresher courses for those presently on duty.

There is no question but that Mr. Moreland is attempting merely to scratch the surface in this vast area of law since he limits himself to one volume. On the other hand, those areas of criminal procedure to which the author addresses himself are those which seem to appear daily in the press and other media of communication and which uniquely, deal with the fundamental rights of the criminal.

The format of the book divides it into five parts: Arrest, Methods of Obtaining Evidence, Proceedings Prior to Trial, Trial and Appeal, and Sentencing Powers and Practices of Courts. The theme of the fundamental rights of the criminal throughout all of these subdivisions is paramount. One does not get the impression that the author is a do-gooder, but concludes that he is sincerely seeking justice as it should be practiced in the courts.

There are two judicial dispositions of a convicted felon. He may be incarcerated in a penitentiary or pay a fine, or he may be placed upon supervised probation. A third method of disposal of a convict is that of parole. Parole is essentially an executive function because, in essence, it is an extension of clemency by the chief executive officer. The parole system and methods of granting and revoking them vary from state to state. Since the subject of parole is so diverse, it is the subject of continuing controversy and discussion.

This reviewer believes that most Judges are not competent to pass sentence on individual convicts any more so that they would be to prescribe a medication for a patient. Merely because a Judge attended college and law school, then succeeded at the polls or was appointed to the bench does not automatically endow him with the competency requi-

site for the sentencing process. With a proper background in sociology and psychology and with sufficient training in these areas, one may become adept in determining how long a particular individual should remain in confinement consistent with the objectives of the penal system. That is to say, whether or not maximum benefits have been obtained by that individual insofar as the penal system of that state can provide. At one time, the purpose of incarceration was solely for punishment. Gradually society became aware that punishment ought not be an end in and of itself. There is no question that punishment does act as a deterrent as to the individual criminal but it also has propaganda value as to others. Society has gradually shifted its view from punishment to deterrence, and is now working on a theory of education and reform. Mr. Moreland points out that this new theory began essentially with the Juvenile Court system; that it is spreading rapidly to youthful offenders, who are between the ages of 17 and 21, and that it may possibly be extended to the whole sentencing and parole program. The author indicates that the plan is really becoming, at least in theory, a real correctional program.

A parole system properly created and administered would go a long way in laying the foundation for a true correctional program of our criminal deviants. If a parole system so created is administered with sufficient safe-guards to protect the society in which the parolees are discharged, it would appear that the theory of parole is fundamentally sound. If one regards the granting of a parole, not as an automatic reward to shorten a sentence for a convict, simply to reduce the period of confinement as an end in itself, but as a physician writes a prescription; then it is personal and designed for the particular situation of the individual convict. In this manner the desirable objectives are more likely to be attained. Parole is uniquely personal. Most assuredly, the parole system has a great deal of value in the administration of the prison in its day to day operation; it would also appear that the possibility of parole should never be extinguished as to any convict. It will be necessary that workable rules be adopted in order that the triumvirate of objectives is met: punishment, deterrent, reformation and education. It seems, from the judicial standpoint, that in the vast majority of cases the indeterminate sentence is the most appropriate that can be given. Such a sentence enables professional prison personnel to determine when, in their judgment—and their judgment should have tremendous weight since they are in daily contact with the prisoners—the prisoner ought to be released. It would seem that the matter of sentencing an individual to the penitentiary for a specified period is, in the main, not in keeping with the knowledge our social scientists have acquired insofar as man's behavior is concerned.

Mr. Moreland quotes at length from the Model Penal Code. The Code provides that before making a determination as to the release of a prisoner who is eligible for a parole, the following information concerning that prisoner should be obtained:

> "(1) A report prepared by the institutional parole staff, relating to his personality, social history and adjustment to authority, and

including any recommendations which the institutional staff may make;

(2) all official reports of his prior criminal records, including reports and records of earlier probation and parole experiences;

(3) the pre-sentence investigation report of the sentencing court;

(4) recommendations regarding his parole made at the time of sentencing by the sentencing judge or the prosecutor;

(5) the report of any physical, mental and psychiatric examinations of the prisoner;

(6) any relevant information which may be submitted by the prisoner, his attorney, the victim of his crime, or by other persons;

(7) the prisoner's parole plan;

(8) such other relevant information concerning the prisoner as may be reasonably available, . . ."

After that information is before the Parole Board, then it should take into account the following considerations regarding the prisoner before making its determination.

"(a) the prisoner's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) the adequacy of the prisoner's parole plan;

(c) the prisoner's ability and readiness to assume obligations and undertake responsibilities;

(d) the prisoner's intelligence and training;

(e) the prisoner's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) the prisoner's employment history, his occupational skills, the stability of his past employment;

(g) the type of residence, neighborhood or community in which the prisoner plans to live;

(h) the prisoner's past use of narcotics, or past habitual and excessive use of alcohol;

(i) the prisoner's mental or physical make-up, including any disability or handicap which may affect his conformity to law;

(j) the prisoner's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) the prisoner's attitude toward law and authority;

(l) the prisoner's conduct in the institution, including particularly whether he has taken advantage of the opportunities for self-improvement afforded by the institutional program, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether he has forfeited any reductions of term during his period of imprisonment, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) the prisoner's conduct and attitude during any previous experience of probation or parole and the recency of such experience.

All in all, Mr. Moreland has given us a thoughtful discussion of select areas of criminal procedure. He recognizes that certain changes should be made in the law is it exists today, and one suspects that the author is sympathetic with the wrongdoer in the hands of law enforcement officers. He favors wider use of immunity statutes in order that the disclosure of privileged information may be made. He would outlaw wire tapping except in time of national peril. He advocates further abolishing the fee system and greater use of the psychological and psychiatric sciences. Mr. Moreland has written a scholarly treatise which is a useful contribution to the literature existing in this area of the law. His attention to detail, his painstaking approach to the subject and his style of writing are rewarding to the reader. I recommend this book for those interested in the criminal law area.

Arthur B. Custy
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